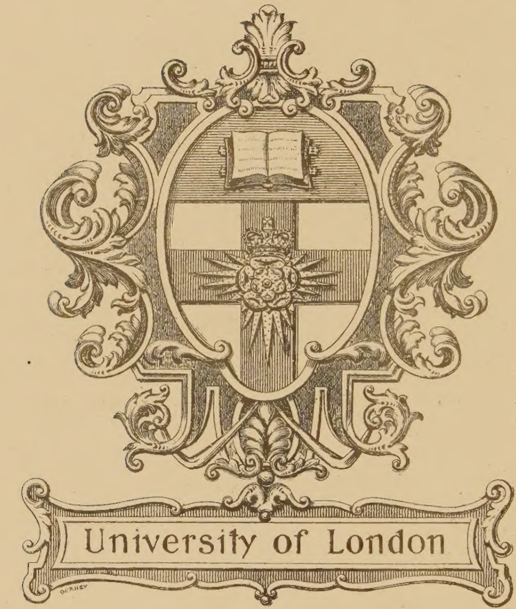
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx North Gallery


University of London

4 JUN 1991

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS THE PRIVY COUNCIL
ALL DIVISIONS OF THE SUPREME COURT
AND
COURTS OF SPECIAL JURISDICTION

1939
VOLUME 4

Consulting Editor:
ROLAND BURROWS, K.C.
Recorder of Cambridge
Managing Editor of Halsbury's Laws of England, Hailsham Edition

Consulting Editor for Chancery Cases:
HAROLD CHRISTIE, K.C.

General Editor:
W. J. WILLIAMS, B.A.,
of Lincoln's Inn, Barrister-at-Law

THE LAW JOURNAL,
37-39 ESSEX STREET, LONDON, W.C.2

BIBL.
LONDIN
UNIV.

ALL ENGLAND LAW REPORTS ANNOTATED

Consulting Editor:
ROLAND BURROWS, Esq., K.C.,
Recorder of Cambridge.
Managing Editor of Halsbury's Laws of England, Hailsham Edition.

Consulting Editor for Chancery Cases:
HAROLD CHRISTIE, Esq., K.C.

General Editor:
W. J. WILLIAMS, Esq., B.A.,
of Lincoln's Inn, Barrister-at-Law.
One of the Editors of the Encyclopædia of Forms and Precedents.

Reporters:

House of Lords	Michael Marcus, B.L. (Edin.)	*Barrister-at-Law.*
Privy Council	Charles Shelley, B.A. (Cantab.)	*Barrister-at-Law.*
Court of Appeal, No. 1	W. K. Scrivener, LL.B.	*Barrister-at-Law.*
Court of Appeal, No. 2	Derek H. Kitchin	*Barrister-at-Law.*
Court of Appeal, No. 3	C. St. John W. Nicholson, B.A. (Oxon.)	*Barrister-at-Law.*
Chancery Division	F. Honig, LL.D. (Heid.) Charles Shelley, B.A. (Cantab.)	*Barristers-at-Law.*
King's Bench Division	W. J. Alderman, B.A. (Cantab.) A. Grimble, M.A. (Cantab.) Gerald Abrahams, B.A. (Oxon.) Ralph Millner M. D. Chorlton, M.A. (Oxon.)	*Barristers-at-Law.*
Court of Criminal Appeal, and Railway and Canal Commission Cases	W. J. Alderman, B.A. (Cantab.)	*Barrister-at-Law.*
Probate and Divorce	J. F. Compton Miller, M.A. (Oxon.)	*Barrister-at-Law.*
Ecclesiastical Cases	J. F. Compton Miller, M.A. (Oxon.)	*Barrister-at-Law.*

These reports are cited thus :
[1939] 4 All E. R.

CASES REPORTED IN VOLUME 4

	PAGE
A. *v.* B. [C.A.]	169
Aldham *v.* United Dairies (London), Ltd. [C.A.]	522
Alexander *v.* Burgoine (H.) & Sons, Ltd. [C.A.]	568
Allen (David) & Sons Billposting, Ltd. *v.* Drysdale [K.B.D.]	113
Araba Tanuah, Hagan *v.*, Hagan *v.* Effuah Adum [P.C.]	97
Army Council, R. *v.*, *Ex parte* Sandford [K.B.D. Divl. Ct.]	102
Ayres *v.* Moore [K.B.D.]	351
B., A. *v.* [C.A.]	169
Barrowford Holdings, Ltd. *v.* Inland Revenue Commissioners [C.A.]	380
Bates, Newton &, Cator *v.* [C.A.]	457
Beacon Insurance Co., Ltd. *v.* Langdale [C.A.]	204
Bennett (T. W.) & Co., Ltd., Tooke *v.* [K.B.D.]	200
Birmingham Corporation, Smith, Stone & Knight, Ltd. *v.* [K.B.D.]	116
Blathwayt, Walsingham *v.*, *Re* Morrison's Will Trusts [Ch.D.]	332
Bolton Recorder, R. *v.*, *Ex parte* McVittie [C.A.]	236
British and Argentine Meat Co., Ltd. *v.* Randall [C.A.]	293
Briton Ferry Steel Co., Ltd. *v.* Barry [C.A.]	541
Brown (G. F. & A.) & Sons, Ltd., *Re*, Appeal of Sherwood [K.B.D.]	291
B.S.A. Tools, Ltd., Hancock *v.* [K.B.D.]	538
Barry, Briton Ferry Steel Co., Ltd. *v.* [C.A.]	541
Buck, Goodbarne *v.* [K.B.D.]	107
Burgoine (H.) & Sons, Ltd., Alexander *v.* [C.A.]	568
Cammell Laird & Co., Ltd., Smith *v.* [H.L.]	381
Campbell *v.* Campbell [C.A.]	529
Capon, *Re*, Trustee in Bankruptcy *v.* Knight (R. C.) & Sons [Ch.D. Divl. Ct.]	554
Capon, *Re*, Trustee in Bankruptcy *v.* Woodward & Woodward [Ch.D. Divl. Ct.]	554
Cator *v.* Newton & Bates [C.A.]	457
Cawston's Conveyance, *Re*, St. Luke, Bromley Common (Vicar and Churchwardens) *v.* Cawston [C.A.]	140
Century Insurance Co., Ltd., Price and, Portavon Cinema Co., Ltd. *v.* [K.B.D.]	601
Clark *v.* Smith [C.A.]	59
Cockwell *v.* Romford Sanitary Steam Laundry, Ltd. [C.A.]	370
Cohen, Wringe *v.* [C.A.]	241
Colwell, Hunt Brothers *v.* [C.A.]	406
Compagnie Primera de Navagaziona de Panama and Compania Arrendataria de Monopolio de Petroleos S.A., *Re* An Arbitration between, The Yolanda [C.A.]	81
Compania Arrendataria de Monopolio de Petroleos S.A., Compagnie Primera de Navagaziona de Panama and, *Re* An Arbitration between, The Yolanda [C.A.]	81
Cookson, Nelson *v.* [K.B.D.]	30
Cooper *v.* Luxor (Eastbourne), Ltd. [C.A.]	411
Craig, Dover Navigation Co., Ltd. *v.* [H.L.]	558
Crane *v.* Hegeman-Harris Co., Inc. [C.A.]	68
Davis *v.* Foots [C.A.]	4
Debtor, *Re* A, *Ex parte* Dunn Trust, Ltd. [Ch.D. Divl. Ct.]	337
Dover Navigation Co., Ltd. *v.* Craig [H.L.]	558
Drysdale, David Allen & Sons Billposting, Ltd. *v.* [K.B.D.]	113
D'Urso *v.* Sanson [K.B.D.]	26
Dunn Trust, Ltd., *Ex parte*, *Re* A Debtor [Ch.D. Divl. Ct.]	337
East Suffolk Rivers Catchment Board, Kent and Porter *v.* [C.A.]	174
Eaves, *Re*, Eaves *v.* Eaves [C.A.]	260
Effuah Adum, Hagan *v.*, Hagan *v.* Araba Tanuah [P.C.]	97
Ellinger *v.* Guinness, Mahon & Co., Frankfurter Bank A.-G. and Metall Gesellschaft A.-G. [Ch.D.]	16
Elman, Myers *v.* [H.L.]	484
English *v.* Western [K.B.D.]	345
Foots, Davis *v.* [C.A.]	4
Forbes, Mackay *v.* [P.C.]	368
Francis Day & Hunter, Ltd. *v.* Twentieth Century Fox Corporation, Ltd. [P.C.]	192
Fraser-Wallas *v.* Waters (Elsie and Doris) [K.B.D.]	609
Frew, Goddard & Smith *v.* [C.A.]	358
Gillingham, R. *v.* [C.C.A.]	122
Goddard & Smith *v.* Frew [C.A.]	358
Goodbarne *v.* Buck [K.B.D.]	107
Gort Estates Co., Third Party, Rousou *v.* Photi [K.B.D.]	616
Gower and McAdam, Tomley *v.* [Ch.D.]	460
Griggs *v.* Petts [C.A.]	39
Guinness, Mahon & Co., Frankfurter Bank A.-G. and Metall Gesellschaft A.-G., Ellinger *v.* [Ch.D.]	16
Hackbridge Park Residential Hotel, Ltd., Hodges (G. T.) & Sons *v.* [C.A.]	347
Hagan *v.* Effuah Adum, Hagan *v.* Araba Tanuah [P.C.]	97
Haile *v.* West [C.A.]	339
Halifax Building Society *v.* Salisbury [C.A.]	427
Hall *v.* Wilson [K.B.D.]	85
Hancock *v.* B.S.A. Tools, Ltd. [K.B.D.]	538
Hawkins *v.* Monmouthshire and South Wales Mutual Indemnity Society, Ltd. [H.L.]	570
Hegeman-Harris Co., Inc., Crane *v.* [C.A.]	68
Herschthal *v.* Stewart & Ardern, Ltd. [K.B.D.]	123
Hodges (G. T.) & Sons *v.* Hackbridge Park Residential Hotel, Ltd. [C.A.]	347
Holloway *v.* Poplar Borough Council [K.B.D.]	165
Hunt Brothers *v.* Colwell [C.A.]	406
Inland Revenue Commissioners, Barrowford Holdings, Ltd. *v.* [C.A.]	380

PAGE
James *v.* Monmouthshire and South Wales Mutual Indemnity Society, Ltd. [H.L.] .. 570
Jameson, Stovell *v.* [K.B.D. Divl. Ct.] .. 76
Jennings *v.* Kelly [H.L.] 464
Johnson (A.) (Hove), Ltd., *Re*, Appeal of Thompson [K.B.D.] 277

Kelly, Jennings *v.* [H.L.] 464
Kent and Porter *v.* East Suffolk Rivers Catchment Board [C.A.] 174
Khoo Soo Chong, Tan Ma Shwe Zin *v.* [P.C.] .. 43
Knight (R. C.) & Sons, Trustee in Bankruptcy *v.*, *Re* Capon [Ch.D. Divl. Ct.] 554

Langdale, Beacon Insurance Co., Ltd. *v.* [C.A.] 204
Laver (Arnold) & Co., Ltd., Oulu Osakayetio of Oulu, Finland *v.* [K.B.D.] 88
London Express Newspaper, Ltd., Newstead *v.* [C.A.] 319
Luxor (Eastbourne), Ltd., Cooper *v.* [C.A.] .. 411

McAdam, Gower and, Tomley *v.* [Ch.D.] .. 460
MacFisheries, Ltd., Petrie *v.* [C.A.] 281
Mackay *v.* Forbes [P.C.] 368
McVittie, *Ex parte*, R. *v.* Bolton Recorder [C.A.] 236
Mansour (Anis), Ottoman Bank, Haifa *v.* [P.C.] 9
Menni (Clement), Ottoman Bank, Haifa *v.* [P.C.] 9
Minister of National Revenue, Pioneer Laundry and Dry Cleaners, Ltd. *v.* [P.C.] .. 254
Minister of National Revenue *v.* Trusts and Guarantee Co., Ltd. [P.C.] 149
Monmouthshire and South Wales Mutual Indemnity Society, Ltd., Hawkins *v.* [H.L.] 570
Monmouthshire and South Wales Mutual Indemnity Society, Ltd., James *v.* [H.L.] .. 570
Monmouthshire and South Wales Mutual Indemnity Society, Ltd., Wooding *v.* [H.L.] 570
Moore, Ayres *v.* [K.B.D.] 351
Morley *v.* Staffordshire County Council [C.A.] 92
Morrison's Will Trusts, *Re*, Walsingham *v.* Blathwayt [Ch.D.] 332
Myers *v.* Elman [H.L.] 484

Nelson *v.* Cookson [K.B.D.] 30
Newstead *v.* London Express Newspaper, Ltd. [C.A.] 319
Newton & Bates, Cator *v.* [C.A.] 457
Nugent *v.* Phillips [K.B.D. Divl. Ct.] 57

Ottoman Bank, Haifa *v.* Anis Mansour [P.C.] 9
Ottoman Bank, Haifa *v.* Clement Menni [P.C.] 9
Oulu Osakayetio of Oulu, Finland *v.* Laver (Arnold) & Co., Ltd. [K.B.D.] 88
Oxford City Council, Urban Housing Co., Ltd. *v.* [C.A.] 211

Petrie *v.* MacFisheries, Ltd. [C.A.] 281
Petts, Griggs *v.* [C.A.] 39
Phillips, Nugent *v.* [K.B.D. Divl. Ct.] 57
Photi, Rousou *v.* (Gort Estates Co., Third Party) [K.B.D.] 616
Pioneer Laundry and Dry Cleaners, Ltd. *v.* Minister of National Revenue [P.C.] .. 254
Poplar Borough Council, Holloway *v.* [K.B.D.] 165
Portavon Cinema Co., Ltd. *v.* Price and Century Insurance Co., Ltd. [K.B.D.] .. 601
Porter, Kent and, *v.* East Suffolk Rivers Catchment Board [C.A.] 174
Postmaster-General, *Re*, Appeal of Roberts [K.B.D.] 269
Postmaster-General *v.* Wadsworth [C.A.] .. 1
Potter, Sowler *v.* [K.B.D.] 478
Price and Century Insurance Co., Ltd., Portavon Cinema Co., Ltd. *v.* [K.B.D.] .. 601
Provender Millers (Winchester), Ltd. *v.* Southampton County Council [C.A.] 157

R. *v.* Army Council, *Ex parte* Sandford [K.B.D. Divl. Ct.] 102
R. *v.* Bolton Recorder, *Ex parte* McVittie [C.A.] 236
R. *v.* Gillingham [C.C.A.] 122
R. *v.* Winfield [C.C.A.] 164
Randall, British and Argentine Meat Co., Ltd. *v.* [C.A.] 293

Reeves *v.* Reeves [Div.] 378
Roberts, Appeal of, *Re* Postmaster-General [K.B.D.] 269
Romford Sanitary Steam Laundry, Ltd., Cockwell *v.* [C.A.] 370
Ross, Schaffer *v.* [C.A.] 363
Rousou *v.* Photi (Gort Estates Co., Third Party) [K.B.D.] 616
Rushbrook *v.* Rushbrook (by her Guardian) [Div.] 73

St. Luke, Bromley Common Vicar and Churchwardens) *v.* Cawston, *Re* Cawston's Conveyance [C.A.] 140
Salisbury, Halifax Building Society *v.* [C.A.] 427
Sandford, *Ex parte*, R. *v.* Army Council [K.B.D. Divl. Ct.] 102
Sanson, D'Urso *v.* [K.B.D.] 26
Schaffer *v.* Ross [C.A.] 363
Selwood *v.* Towneley Coal and Fireclay Co., Ltd. [C.A.] 34
Sherwood, Appeal of, *Re* Brown (G. F. & A.) & Sons, Ltd. [K.B.D.] 291
Sidery, Wells & Son, Ltd. *v.* [K.B.D. Divl. Ct.] 54
Smith *v.* Cammell Laird & Co., Ltd. [H.L.] 381
Smith, Clark *v.* [C.A.] 59
Smith *v.* Smith [K.B.D.] 312
Smith *v.* Smith [Div.] 533
Smith, Stone & Knight, Ltd. *v.* Birmingham Corporation [K.B.D.] 116
Southampton County Council, Provender Millers (Winchester), Ltd. *v.* [C.A.] 157
Sowler *v.* Potter [K.B.D.] 478
Staffordshire County Council, Morley *v.* [C.A.] 92
Standard Telephones and Cables, Ltd., Stimson *v.* [C.A.] 225
Stevens *v.* Tirard [C.A.] 186
Stevenson, Tilley *v.* [C.A.] 207
Stewart & Ardern, Ltd., Herschthal *v.* [K.B.D.] 123
Stimson *v.* Standard Telephones and Cables, Ltd. [C.A.] 225
Stovell *v.* Jameson [K.B.D. Divl. Ct.] 76

Tan Ma Shwe Zin *v.* Khoo Soo Chong [P.C.] .. 43
Thompson, Appeal of, *Re* Johnson (A.) (Hove), Ltd. [K.B.D.] 277
Tilley *v.* Stevenson [C.A.] 207
Tirard, Stevens *v.* [C.A.] 186
Tomley *v.* Gower and McAdam [Ch.D.] .. 460
Tooke *v.* Bennett (T. W.), & Co., Ltd. [K.B.D.] 200
Towneley Coal and Fireclay Co., Ltd., Selwood *v.* [C.A.] 34
Trustee in Bankruptcy *v.* Knight (R. C.) & Sons, *Re* Capon [Ch.D. Divl. Ct.] 554
Trustee in Bankruptcy *v.* Woodward & Woodward, *Re* Capon [Ch.D. Divl. Ct.] .. 554
Trusts and Guarantee Co., Ltd., Minister of National Revenue *v.* [P.C.] 149
Twentieth Century Fox Corporation, Ltd., Francis Day & Hunter, Ltd. *v.* [P.C.] 192

United Dairies (London), Ltd., Aldham *v.* [C.A.] 522
Urban Housing Co., Ltd. *v.* Oxford City Council [C.A.] 211

Vionnet (Madeleine) et Cie. *v.* Wills [C.A.] .. 136

Wadsworth, Postmaster-General *v.* [C.A.] .. 1
Walsingham *v.* Blathwayt, *Re* Morrison's Will Trusts [Ch.D.] 332
Waters (Elsie and Doris), Fraser-Wallas *v.* [K.B.D.] 609
Wells & Son, Ltd. *v.* Sidery [K.B.D. Divl. Ct.] 54
West, Haile *v.* [C.A.] 339
Western, English *v.* [K.B.D.] 345
Wills, Vionnet (Madeleine) et Cie. *v.* [C.A.] .. 136
Wilson, Hall *v.* [K.B.D.] 85
Winfield, R. *v.* [C.C.A.] 164
Wooding *v.* Monmouthshire and South Wales Mutual Indemnity Society, Ltd. [H.L.] .. 570
Woodward & Woodward, Trustee in Bankruptcy *v.*, *Re* Capon [Ch.D. Divl. Ct.] .. 554
Wringe *v.* Cohen [C.A.] 241

Yolanda, The, *Re* An Arbitration between Compagnie Primera de Navagaziona de Panama and Compania Arrendataria de Monopolio de Petroleos S.A. [C.A.] 81

CASES REFERRED TO

PAGES
A. *v.* A. (sued as B.) (1887), 19 L.R.Ir. 403; 27 Digest 266, case *s* 260, 265
Abdurahim *v.* Halimabai (1915), L.R. 43 Ind. App. 35 .. .. 44, 53
Abraham *v.* Abraham (1863), 9. Moo. Ind. App. 199 .. .. 44, 52
Adamson *v.* Melbourne and Metropolitan Board of Works, [1929] A.C. 142; Digest Supp.; 98 L.J.P.C. 20; 140 L.T. 107 150
Addie & Sons, *Re* (1875), 1 Tax Cas. 1; 28 Digest 48, case *246i* 255, 256
Aiken *v.* Short (1856), 1 H. & N. 210; 35 Digest 148, *461*; 25 L.J.Ex. 321; 27 L.T.O.S. 188 .. .. 352, 353, 354
Amalgamated Society of Railway Servants *v.* Osborne, [1910] A.C. 87; 12 Digest 254, *2079*; 79 L.J.Ch. 87; 101 L.T. 787 .. .. 428, 453
Angus *v* Clifford, [1891] 2 Ch. 449; 35 Digest 54, *488*; 60 L.J.Ch. 443; 65 L.T. 274 428, 448, 452
Apana *v.* Ma Shwe Nu (1907), 4 L.B.R. 124 .. .. 44, 48
Apted *v.* Apted & Bliss, [1930] P. 246; Digest Supp.; 99 L.J.P. 73; 143 L.T. 353 378, 379
Apthorpe *v.* Peter Schoenhofen Brewing Co., Ltd. (1899), 80 L.T. 395; 28 Digest 29, *150*; 4 Tax Cas. 41 .. .. 117, 121
Atkinson *v.* Ritchie (1809), 10 East, 530; 41 Digest 464, *2955* 411, 422
A.-G. *v.* Great Eastern Ry. Co. (1880), 5 App. Cas. 473; 13 Digest 367, *998*; 49 L.J.Ch. 545; 42 L.T. 810 .. .. 428, 429, 440, 453, 454
A.-G. *v.* Hooper, [1893] 3 Ch. 483; 26 Digest 566, *2597*; 63 L.J.Ch. 18; 69 L.T. 340 212, 213
A.-G. *v.* Smethwick Corpn., [1932] 1 Ch. 562; Digest Supp.; 101 L.J.Ch. 137; 146 L.T. 480 .. .. 428, 429
A.-G. *v.* Tod Heatley, [1897] 1 Ch. 560; 36 Digest 177, *221*; 66 L.J.Ch. 275; 76 L.T. 174 .. .. 241, 244
Ayers *v.* South Australian Banking Co. (1871), L.R. 3 P.C. 548; 7 Moo. P.C.C. 432; Digest Supp.; *sub nom.* Ayres *v.* South Australian Banking Co., 40 L.J.P.C. 22 428, 429

Baker *v.* Courage & Co., [1910] 1 K.B. 56; 32 Digest 337, *206*; 79 L.J.K.B. 313; 101 L.T. 854 .. .. 261, 262
Balwant Rao *v.* Baji Rao (1921), I.L.R. 48 Cal. 30 .. .. 44, 50
Barker *v.* Herbert, [1911] 2 K.B. 633; 36 Digest 197, *374*; 80 L.J.K.B. 1329; 105 L.T. 349 .. .. 242, 246, 249, 250, 251, 252, 253
Bartell *v.* Gray (W.) & Co., [1902] 1 K.B. 225; 24 Digest 917, *122*; 71 L.J.K.B. 115; 85 L.T. 658 .. .. 382, 385
Batey, *Re*, *Ex p.* Emmanuel (1881), 17 Ch.D. 35; 4 Digest 213, *1976*; 50 L.J.Ch. 305; 44 L.T. 832 .. .. 59, 61, 62, 63, 64, 65
Bell *v.* National Provincial Bank of England, [1904] 1 K.B. 149; 28 Digest 41, *211*; 73 L.J.K.B. 142; 90 L.T. 2; 5 Tax Cas. 1 .. .. 542, 543
Bennett *v.* Bennett, [1939] P. 274; [1939] 2 All E.R. 387; Digest Supp.; 161 L.T. 96 73, 76
Bhugwandass *v.* Netherlands India Sea & Fire Insurance Co. of Batavia (1888), 14 App. Cas. 83; 29 Digest 75, *341* 571, 581
Blundell *v.* Blundell (1822), 5 B. & Ald. 533; 42 Digest 345, *3902* 485, 509
Bodega Co., Ltd., *Re*, [1904] 1 Ch. 276; 35 Digest 147, *457*; 73 L.J.Ch. 198; 89 L.T. 694 .. .. 352, 354
Bottomley *v.* Bannister, [1932] 1 K.B. 458; Digest Supp.; 101 L.J.K.B. 46; 146 L.T. 68 .. .. 4, 5, 6
Boulter *v.* Kent JJ., [1897] A.C. 556; 30 Digest 69, *548*; 66 L.J.Q.B. 787; 77 L.T. 288; *revsg.* S.C. *sub nom.* R. *v.* Kent JJ., [1896] 2 Q.B. 306 .. .. .. 465, 473, 474
Bradford Third Equitable Benefit Building Society *v.* Borders, [1939] Ch. 520; [1939] 1 All E.R. 481; Digest Supp.; 108 L.J.Ch. 171; 160 L.T. 456 .. 427, 428, 429, 433, 443
Bradley *v.* Wallaces, Ltd., [1913] 3 K.B. 629; 2 Digest 236, *236*; 82 L.J.K.B. 1074; 109 L.T. 281; 6 B.W.C.C. 706 523
Branson, *Re*, *Ex p.* Trustee, [1914] 2 K.B. 701; 5 Digest 987, *8075*; 83 L.J.K.B. 1316; 110 L.T. 940 .. .. 59, 62, 64, 65, 66
Brendon *v.* Spiro, [1938] 1 K.B. 176; [1937] 2 All E.R. 496; Digest Supp.; 107 L.J.K.B. 481; 157 L.T. 265 .. .. 485, 519
Brewster *v.* Kidgell (1698), Carth. 438; 31 Digest 297, *4421* 312, 315
British American Continental Bank, Ltd., *Re*, Credit General Liegeois' Claim, [1922] 2 Ch. 589; 35 Digest 174, *46*; 91 L.J.Ch. 765; 127 L.T. 284 .. .. .. 137, 139
British American Continental Bank, Ltd., *Re*, Goldzieher & Penso's Claim, [1922] 2 Ch. 575; 35 Digest 175, *53*; 91 L.J.Ch. 760 .. .. 137, 139
British American Continental Bank, Ltd., *Re*, Lisser & Rosenkranz's Claim, [1923] 1 Ch. 276; 35 Digest 175, *54*; 92 L.J.Ch. 241; 128 L.T. 727 .. .. .. 137, 139
British Equitable Assurance Co., Ltd. *v.* Baily, [1906] A.C. 35; 10 Digest 1069, *7482*; 75 L.J.Ch. 73; 94 L.T. 1; *revsg.* S.C. *sub nom.* Baily *v.* British Equitable Assurance Co., [1904] 1 Ch. 374 .. .. 571, 574
Brooker *v.* Borthwick (Thomas) & Sons (Australasia), Ltd., [1933] A.C. 669; Digest Supp.; 102 L.J.P.C. 170; 149 L.T. 590; 26 B.W.C.C. 495 .. .. 558, 559, 560, 563, 566
Brooks *v.* Brimecome, [1937] 2 K.B. 675; [1937] 2 All E.R. 637; Digest Supp.; 157 L.T. 417 .. .. 364, 365
Brooks *v.* Muckleston, [1909] 2 Ch. 519; 20 Digest 525, *2497*; 79 L.J.Ch. 12; 101 L.T. 343 261
Brown *v.* Cotterill (1934), 51 T.L.R. 21; Digest Supp. 124, 134
Brown *v.* New Empress Saloons, Ltd., [1937] 2 All E.R. 133; Digest Supp.; 106 L.J.K.B. 331; 156 L.T. 427 40
Browning *v.* Crumlin Valley Collieries, [1926] 1 K.B. 522; 34 Digest 730, *1106*; 95 L.J.K.B. 711; 134 L.T. 603 .. .. 282, 290
Bruce *v.* Odhams Press, Ltd., [1936] 1 K.B. 697; [1936] 1 All E.R. 287; Digest Supp.; 105 L.J.K.B. 318; 154 L.T. 423 .. .. 320, 321, 322

Cairncross *v.* Lorimer (1860), 3 L.T. 130; 21 Digest 328, *1227* 260, 264

PAGES

Campbell (Donald) *&* Co. *v.* Pollak, [1927] A.C. 732; Digest, Practice, 861, *4061*; 96 L.J.K.B. 1132; 137 L.T. 656 .. 40, 41, 339, 341
Canadian Performing Right Society *v.* Famous Players Canadian Corpn., [1929] A.C. 456; Digest Supp.; 98 L.J.P.C. 70; 140 L.T. 657 .. 194
Capital *&* Counties Bank *v.* Henty (1882), 7 App. Cas. 741; 32 Digest 21, *121*; 52 L.J.Q.B. 232; 47 L.T. 662 .. 320, 322
Cassidy *v.* Daily Mirror Newspapers, [1929] 2 K.B. 331; Digest Supp.; 98 L.J.K.B. 595; 141 L.T. 404 .. 320, 321, 322, 330, 331
Caswell *v.* Powell Duffryn Associated Collieries, Ltd., [1939] 3 All E.R. 722; Digest Supp. .. 226, 227, 229
Cavendish *v.* Cavendish, [1926] P. 10; 27 Digest 425, *4313* .. 530, 531, 533
Celia (S.S.) *v.* Volturno (S.S.), [1921] 2 A.C. 544; 35 Digest 174, *39*; 90 L.J.P. 385; 126 L.T. 1 .. 137, 138, 139, 140
Chan Pyv *v.* Saw Sin (1928), I.L.R. 6 Ran. 623; Digest Supp. .. 44, 48
Chesterman's Trusts, *Re*, Mott *v.* Browning, [1923] 2 Ch. 466; 35 Digest 169, *12*; 93 L.J.Ch. 263; 130 L.T. 109 .. 137, 139
Clark *v.* Smith, [1939] 4 All E.R. 59; Digest Supp. .. 428, 429
Coltman, *Re*, Coltman *v.* Coltman (1881), 19 Ch.D. 64; 25 Digest 317, *204*; 51 L.J.Ch. 3; 45 L.T. 392 .. 428, 429, 445
Connecticut Fire Insurance Co. *v.* Kavanagh, [1892] A.C. 473; 16 Digest 155, *551*; 61 L.J.P.C. 50; 67 L.T. 508 .. 97, 100
Cooper *v.* Oldham Chronicle (1931), Unreported, Dec. 1 .. 320, 322
Cooper *v.* Wandsworth Board of Works (1863), 14 C.B.N.S. 180; 26 Digest 518, *2202*; 32 L.J.C.P. 185; 8 L.T. 278 .. 212, 213
Cope *v.* Rowlands (1836), 2 M. *&* W. 149; 12 Digest 273, *2232*; 6 L.J.Ex. 63 .. 428, 429
Cotter *v.* Layer (1731), 2 P. Wms. 623; 37 Digest 500, *928* .. 141
Cox *v.* Burbidge (1863), 13 C.B.N.S. 430; 2 Digest 233, *218*; 32 L.J.C.P. 89 523, 524, 525, 526, 527, 528
Cox *v.* Coulson, [1916] 2 K.B. 177; 42 Digest 909, *53*; 85 L.J.K.B. 1081; 114 L.T. 599 609, 611, 613
Cuckson *v.* Stones (1858), 1 E. *&* E. 248; 34 Digest 71, *483*; 28 L.J.Q.B. 25; 32 L.T.O.S. 242 .. 281, 283
Cullerne *v.* London *&* Suburban General Permanent Building Society (1890), 25 Q.B.D. 485; 7 Digest 461, *38*; 59 L.J.Q.B. 525; 63 L.T. 511 .. 428, 431, 445, 453
Cutter *v.* Powell (1795), 6 Term Rep. 320; 34 Digest 88, *649* .. 282, 291, 539, 540

Daff *v.* Midland Colliery Owners' Mutual Indemnity Co. (1913), 82 L.J.K.B. 1540; 29 Digest 407, *3206*; 109 L.T. 418; 6 B.W.C.C. 799 .. 571, 589
Daines *&* Braddock *v.* Hartley (1848), 3 Exch. 200; 32 Digest 60, *883*; 18 L.J.Ex. 81; *sub nom.* Danes *v.* Hartley, 12 L.T.O.S. 271 .. 320, 322
Davies *v.* Davies, [1928] 1 K.B. 364; Digest Supp.; 96 L.J.K.B. 1066; 137 L.T. 567 .. 340, 342, 343, 344
Davies, *Re* (1898), 14 T.L.R. 332; 42 Digest 404, *4593* .. 485, 511
De Bernardy *v.* Harding (1853), 8 Exch. 822; 12 Digest 334, *2805*; 22 L.J.Ex. 340; 21 L.T.O.S. 158 .. 411, 420
Deedar Hossein (Rajah) *v.* Zuhoor-Oon Nissa (Ranee) (1841), 2 Moo. Ind. App. 441; 16 Digest 147, *475* .. 44, 50, 51
Deen *v.* Davies [1935] 2 K.B. 282; Digest Supp.; 104 L.J.K.B. 540; 153 L.T. 90 523, 524, 528
Denni *v.* White (A. J.) *&* Co., [1917] A.C. 479; 34 Digest 321, *2627*; 86 L.J.K.B. 1074; 1s16 L.T. 774; 10 B.W.C.C. 280; *revsg.*, [1916] 2 K.B. 1 .. 558, 559, 561, 565, 567
Dennis *v.* Malcolm, [1934] Ch. 244; Digest Supp.; 103 L.J.Ch. 140; *sub nom. Re* Cheam Common School, Dennis *v.* Malcolm, 150 L.T. 394 .. 140, 141, 145
Derry *v.* Peek (1889), 14 App. Cas. 337; 35 Digest 27, *185*; 58 L.J.Ch. 864; 61 L.T. 265; *revsg.* (1887), 37 Ch.D. 541 .. 320, 324
Deutsche Bank Filiale Nurnberg *v.* Humphrey (1926), 272 U.S. Rep. 517 .. 137, 138
Di Ferdinando *v.* Simon, Smits *&* Co., Ltd., [1920] 3 K.B. 409; 35 Digest 175, *52*; 89 L.J.K.B. 1039; 124 L.T. 117 .. 137, 138
Dicks *v.* Yates (1881), 18 Ch.D. 76; 13 Digest 178, *133*; 50 L.J.Ch. 809; 44 L.T. 660 193, 198, 199
Dodworth *v.* Dale, [1936] 2 K.B. 503; [1936] 2 All E.R. 440; Digest Supp.; 105 L.J.K.B. 586; 155 L.T. 290; 20 Tax Cas. 285 .. 260, 261, 262, 264, 266
Doe d. Gray *v.* Stanion (1836), 1 M. *&* W. 695; 40 Digest 137, *1078*; 5 L.J.Ex. 253 371, 375
Douglas, *Re*, Obert *v.* Barrow (1887), 35 Ch.D. 472; 8 Digest 258, *205*; 56 L.J.Ch. 913; 56 L.T. 786 .. 150
Dransfield *v.* British Insulated Cables, Ltd., [1937] 4 All E.R. 382; Digest Supp. 124, 133, 134
Driver *v.* Driver, Unreported .. 534, 537
Dunbar *v.* Dunbar, [1909] 2 Ch. 639; 27 Digest 165, *1339*; 79 L.J.Ch. 70; 101 L.T. 553 261, 262
Dunning *v.* Swetman [1909] 1 K.B. 774; 25 Digest 434, *318*; 78 L.J.K.B. 359; 100 L.T. 604 .. 76, 78
Dunkley *v.* Farris (1851), 11 C.B. 457; 42 Digest 343, *3886* .. 485, 497, 510, 520

Earl *v.* Lubbock, [1905] 1 K.B. 253; 36 Digest 63, *408*; 74 L.J.K.B. 121; 91 L.T. 830 124, 131, 132
East Anglian Rys. Co. *v.* Eastern Counties Ry. Co. (1851), 11 C.B. 775; 13 Digest 368, *1004*; 21 L.J.C.P. 23; 18 L.T.O.S. 138 .. 428, 429
East Fremantle Corpn. *v.* Annois, [1902] A.C. 213; 38 Digest 28, *158*; 71 L.J.P.C. 39; 85 L.T. 732 .. 157, 159, 163
Evans *v.* Bartlam, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311 .. 40, 42
Eyre, *Re*, Palmer *v.* Evans (1856), 1 C.B.N.S. 151; 42 Digest 353, *4017*; 28 L.T.O.S. 125 485, 498, 510, 520

Fardon *v.* Harcourt-Rivington (1932), 146 L.T. 391; Digest Supp. .. 523, 524, 528
Farr *v.* Butters Bros. *&* Co., [1932] 2 K.B. 606; Digest Supp.; 101 L.J.K.B. 768; 147 L.T. 427 .. 124, 129
Fone Lan *v.* Ma Gyee (1903), 2 L.B.R. 95 .. 44, 47, 52
Forder *v.* Handyside (1876), 1 Ex.D. 233; 28 Digest 52, *266*; 45 L.J.Q.B. 809; 35 L.T. 62; 1 Tax Cas. 65 .. 255, 256
Fowke *v.* Fowke, [1938] Ch. 774; [1938] 2 All E.R. 638; Digest Supp.; 107 L.J.Ch. 350; 159 L.T. 8 .. 261, 262
Fowke *v.* Horabin (1739), Barnes, 11 .. 485, 489

PAGES
Frame, *Re*, Edwards *v.* Taylor, [1939] 2 All E.R. 865; Digest Supp.; 160 L.T. 620 186, 187, 190
Frampton *v.* Gillison, [1927] 1 Ch. 196; 40 Digest 323, *2729*; 95 L.J.Ch. 555; 136 L.T. 600 .. 269, 277
Freeborn *v.* Leeming, [1926] 1 K.B. 160; 38 Digest 130, *955*; 95 L.J.K.B. 114; 134 L.T. 117 .. 31, 33

G. *v.* G. (falsely called K.) (1908), 25 T.L.R. 328; 27 Digest 268, *2360* .. 260, 265
G. *v.* M. (1885), 10 App. Cas. 171; 27 Digest 351, *3339*; 53 L.T. 398 .. 261, 262
Gallivan *v.* Warman, [1930] W.N. 96; Digest Supp. .. 340, 343
Geddis *v.* Bann Reservoir Proprietors (1878), 3 App. Cas. 430; 43 Digest 1075, *116* 175, 183
Gerrard *v.* Crowe, [1921] 1 A.C. 395; 44 Digest 84, *652*; 90 L.J.P.C. 42; 124 L.T. 486 157, 159
Gillett *v.* Kent Rivers Catchment Board, [1938] 4 All E.R. 810; Digest Supp. 175, 182, 184
Goldsmiths' Co. *v.* Wyatt, [1907] 1 K.B. 95; 42 Digest 685, *992*; 76 L.J.K.B. 166; 95 L.T. 855 .. 465, 471
Gordon *v.* Street, [1899] 2 Q.B. 641; 35 Digest 44, *393*; 69 L.J.Q.B. 45; 81 L.T. 237 479, 481
Gramophone & Typewriter, Ltd. *v.* Stanley, [1908] 2 K.B. 89; 9 Digest 35, *14*; 77 L.J.K.B. 834; 99 L.T. 39; 5 Tax Cas. 358 .. 117, 120
Grant *v.* Australian Knitting Mills, Ltd., [1936] A.C. 85; Digest Supp.; 105 L.J.P.C. 6; 154 L.T. 18 .. 124, 135, 136
Graves & Co., Ltd. *v.* Gorrie, [1903] A.C. 496; 13 Digest 163, *15*; 72 L.J.P.C. 95; 89 L.T. 111 .. 193, 194
Gray, *Re*, *Ex p.* Incorporated Law Society (1869), 20 L.T. 730; 42 Digest 403, *4569* .. 485, 510
Great Central Ry. Co. *v.* Hewlett, [1916] 2 A.C. 511; 38 Digest 354, *594*; 85 L.J.K.B. 1705; 115 L.T. 349 .. 158, 159
Greenwell *v.* Howell, [1900] 1 Q.B. 535; 38 Digest 105, *751*; 69 L.J.Q.B. 461; 82 L.T. 183 .. 31, 32, 34
Groom *v.* Crocker, [1939] 1 K.B. 194; [1938] 2 All E.R. 294; Digest Supp.; 108 L.J.K.B. 296; 158 L.T. 477 .. 204, 206
Grover & Grover, Ltd. *v.* Mathews, [1910] 2 K.B. 401; 29 Digest 327, *2668*; 79 L.J.K.B. 1025; 102 L.T. 650 .. 602, 607
Gwinnell *v.* Eamer (1875), L.R. 10 C.P. 658; 31 Digest 345, *4882*; 32 L.T. 835 .. 241, 245

Hain S.S. Co., Ltd. *v.* Tate & Lyle, Ltd., [1936] 2 All E.R. 597; Digest Supp.; 155 L.T. 177 .. 81, 82, 84
Hall (John) Junior & Co. *v.* Rickman, [1906] 1 K.B. 311; 28 Digest 53, *267*; 75 L.J.K.B. 178; 94 L.T. 224 .. 255, 256
Hanson *v.* Globe Newspaper (1893), 159 Mass. Rep. 273 .. 320, 322
Harris *v.* Hickman, [1904] 1 K.B. 13; 31 Digest 303, *4475*; 73 L.J.K.B. 31; 89 L.T. 722 .. 313, 317, 318
Harrold *v.* Watney, [1898] 2 Q.B. 320; 36 Digest 69, *443*; 67 L.J.Q.B. 771; 78 L.T. 788 .. 242, 248
Haseldine *v.* Hosken, [1933] 1 K.B. 822; Digest Supp.; 102 L.J.K.B. 441; 148 L.T. 510 .. 359, 362
Hayes Bridge Estate *v.* Portman Building Society, [1936] 2 All E.R. 1400; Digest Supp. 428, 429
Heaven *v.* Pender (1883), 11 Q.B.D. 503; 36 Digest 8, *9*; 52 L.J.Q.B. 702; 49 L.T. 357 124, 128
Henry *v.* Hammond, [1913] 2 K.B. 515; 32 Digest 504, *1649*; 82 L.J.K.B. 575; 108 L.T. 729 .. 261, 262
Higgins *v.* Harrison (1932), 25 B.W.C.C. 113; Digest Supp. .. 226, 228
Hindle *v.* Birtwistle, [1897] 1 Q.B. 192; 24 Digest 909, *71*; 66 L.J.Q.B. 173; 76 L.T. 159 .. 226, 235, 236
Hodgson *v.* Halford (1879), 11 Ch.D. 959; 37 Digest 102, *372*; 48 L.J.Ch. 548 .. 333, 336
Holden *v.* Minister of National Revenue, [1933] A.C. 526; Digest Supp.; 102 L.J.P.C. 115; 149 L.T. 315 .. 150
Hong Ku *v.* Ma Thin (1881), L.B. Select Judgments, Vol. I, p. 135 .. 44, 47, 50
Hopkins *v.* Smethwick Local Board of Health (1890), 24 Q.B.D. 712; 26 Digest 564, *2584*; 59 L.J.Q.B. 250; 62 L.T. 783 .. 212, 213, 221
Houlder Line, Ltd. *v.* Griffin, [1905] A.C. 220; 24 Digest 915, *104*; 74 L.J.K.B. 466; 92 L.T. 580; *revsg.*, [1904] 1 K.B. 510 .. 382, 384, 404
Hulton (E.) & Co. *v.* Jones, [1910] A.C. 20; 32 Digest 17, *77*; 79 L.J.K.B. 198; 101 L.T. 831; *affg.*, [1909] 2 K.B. 444 .. 319, 320, 321, 322, 323, 324, 326, 327, 328, 331
Hurst *v.* Picture Theatres, Ltd., [1915] 1 K.B. 1; 42 Digest 905, *23*; 83 L.J.K.B. 1836; 111 L.T. 972 .. 609, 612

Indermaur *v.* Dames (1866), L.R. 1 C.P. 274; 36 Digest 35, *208*; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311 .. 242, 250, 609, 612
Inland Revenue Comrs. *v.* Sansom, [1921] 2 K.B. 492; 28 Digest 101, *612*; 90 L.J.K.B. 627; 125 L.T. 37; 8 Tax Cas. 20 .. 117, 120
Inland Revenue Comrs. *v.* Westminster (Duke), [1936] A.C. 1; Digest Supp.; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490 .. 428, 429, 443

Jackson *v.* Jackson, [1924] P. 19; 27 Digest 308, *2852* .. 534, 536, 537
Jones (Frank) Brewing Co. *v.* Apthorpe (1898), 4 Tax Cas. 6; 28 Digest 26, *138* .. 117, 121
Jones (R. E.), Ltd. *v.* Waring & Gillow, Ltd., [1926] A.C. 670; 35 Digest 149, *470*; 95 L.J.K.B. 913; 135 L.T. 548 .. 352, 354, 356, 357
Jones, *Re* (1870), 6 Ch. App. 497; 42 Digest 352, *4010*; *sub nom.* Fielden *v.* Northern Ry. of Buenos Ayres Co., Ltd., *Re* Jones, 40 L.J.Ch. 113; 23 L.T. 655 .. 485, 488
Jones and Jones *v.* Nelson, [1938] 2 All E.R. 171; Digest Supp. .. 617, 620
Jowala Baksh *v.* Dharum Singh (1866), 10 Moo. Ind. App. 511 .. 44, 52

Kantel *v.* Grant, Nisbet & Auld, Ltd., Watson & Dominion Battery Co., Ltd., [1933] Ex.C.R. 84; Digest Supp. .. 193, 198
Karemaker *v.* Corsican (Owners) (1911), 4 B.W.C.C. 295; 34 Digest 519, *2609* 558, 560, 561, 562, 563, 567
Kelly *v.* Solari (1841), 9 M. & W. 54; 35 Digest 151, *487*; 11 L.J.Ex. 10 .. 352, 353
Keppel *v.* Wheeler, [1927] 1 K.B. 577; Digest Supp.; 96 L.J.K.B. 433; 136 L.T. 203 347, 348
Khatubai *v.* Mahomed Haji Abu (1922), L.R. 50 Ind. App. 108 .. 44, 53
King *v.* King (1850), 2 Rob. Eccl. 153; 27 Digest 426, *4324* .. 530, 531
Kubach *v.* Hollands, [1937] 3 All E.R. 907; Digest Supp. .. 124, 133, 134

PAGES

Lagan Navigation Co. *v.* Lambeg Bleaching, Dyeing & Finishing Co., [1927] A.C. 226; 38 Digest 398, *919*; 96 L.J.P.C. 25; 136 L.T. 417 .. 157, 159
Lake *v.* Simmons, [1927] A.C. 487; 35 Digest 97, *64*; 96 L.J.K.B. 621; 137 L.T. 233 479, 480, 481
Laroque *v.* New York Herald (1917), 220 N.Y. 632 .. 320, 322
Lawrence *v.* Matthews (George) (1924), Ltd., [1929] 1 K.B. 1; Digest Supp.; 97 L.J.K.B. 758; 140 L.T. 25; 21 B.W.C.C. 345 .. 558, 564
Laycock *v.* Freeman, Hardy & Willis, Ltd., [1939] 2 K.B. 1; [1938] 4 All E.R. 609; Digest Supp.: 108 L.J.K.B. 270; 160 L.T. 41 .. 542, 543, 545, 547, 548, 549, 551
Lee *v.* Sangster (1857), 2 C.B.N.S. 1; 5 Digest 979, *8019*; 26 L.J.C.P. 151; 29 L.T.O.S. 93 .. 59, 62
Lee *v.* Wilson & Mackinnon (1935), 51 C.L.R. 276; Digest Supp. .. 320, 322
Lennox *v.* Stoddart, Davis *v.* Stoddart, [1902] 2 K.B. 21; 25 Digest 407, *108*; 71 L.J.K.B. 747; 87 L.T. 283 .. 76, 78
Licensed Victuallers' Newspaper Co. *v.* Bingham (1888), 38 Ch.D. 139; 37 Digest 546, *80*; 58 L.J.Ch. 36; 59 L.T. 187 .. 193, 198
Liddle *v.* North Riding of Yorkshire County Council, [1934] 2 K.B. 101; Digest Supp.; 103 L.J.K.B. 527; 151 L.T. 202 .. 92, 94, 96
Lloyd *v.* Cook, Goudge *v.* Broughton, Simson *v.* Miatt, Bartram *v.* Brown, Barker *v.* Hutson, [1929] 1 K.B. 103; Digest Supp.; 97 L.J.K.B. 657; 139 L.T. 452 364, 366, 367
Lloyd *v.* Grace, Smith & Co., [1912] A.C. 716; 34 Digest 129, *991*; 81 L.J.K.B. 1140; 107 L.T. 531; *revsg.*, [1911] 2 K.B. 489 .. 359, 362
Lodge *v.* Lancashire County Council (1934), 152 L.T. 167; Digest Supp. .. 313, 317
Lord *v.* Croydon Advertiser (1935), *The Times*, Mar. 2, 1935 .. 320, 322
Lowther *v.* Clifford, [1927] 1 K.B. 130; Digest Supp.; 95 L.J.K.B. 576; 135 L.T. 200 313, 317

Ma Tin *v.* Doop Raj Bavna, Chan-Toon, L.C. on Buddhist Law, Vol. I, p. 370 .. 44, 52
Ma Yin Mya *v.* Tan Yauk Pu, (1927) I.L.R. 5 Ran. 406 .. 44, 48
M'Alister (or Donoghue) *v.* Stevenson, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281 .. 4, 8, 123, 124, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136
Mackay *v.* Dick (1881), 6 App. Cas. 251; 12 Digest 431, *3494* .. 411, 420
Mackey *v.* Monks (Preston), [1918] A.C. 59; 24 Digest 919, *135*; 87 L.J.P.C. 28; 118 L.T. 65 .. 382, 388, 391, 393, 395, 398, 402
Mackworth *v.* Hellard, [1921] 2 K.B. 755; 31 Digest 563, *7111*; 90 L.J.K.B. 693; 125 L.T. 451 .. 617, 621
McLeod *v.* Customs & Excise Minister, [1926] S.C.R. 457; Digest Supp. .. 150, 154
MacPherson *v.* Buick Motor Co. (1916), 217 N.Y. 382 .. 124, 131
Mahmoud & Ispahani, *Re*, [1921] 2 K.B. 716; 12 Digest 271, *2220*; 90 L.J.K.B. 821; 125 L.T. 161 .. 428, 429
Mailathi Anni *v.* Subbaraya Mudaliar (1901), I.L.R. 24 Mad. 650 .. 44, 53
Malfroot *v.* Noxal, Ltd. (1935), 51 T.L.R. 551; Digest Supp. .. 124, 130, 134
Man Han *v.* R.M.A.L. Firm (1926), I.L.R. 4 Ran. 110 .. 44, 48
Manchester Corpn. *v.* Farnworth, [1930] A.C. 171; Digest Supp.; 99 L.J.K.B. 83; 142 L.T. 145 .. 157, 159, 163, 164
Manchester Corpn. *v.* McAdam, [1896] A.C. 500; 28 Digest 14, *66*; 65 L.J.Q.B. 672; 75 L.T. 229; 3 Tax Cas. 491 .. 150
Manners *v.* Pearson & Son, [1898] 1 Ch. 581; 35 Digest 176, *57*; 67 L.J.Ch. 304; 78 L.T. 432 .. 137, 139
Mansell *v.* Star Printing & Publishing Co. of Toronto, Ltd., [1937] A.C. 872; [1937] 3 All E.R. 912; Digest Supp.; 106 L.J.P.C. 147; 157 L.T. 445 .. 193, 194, 196, 197
Marchant *v.* Lee Conservancy Board (1874), L.R. 9 Exch. 60; 13 Digest 350, *888*; 43 L.J.Ex. 44; 30 L.T. 367 .. 166, 167
Marrison *v.* Bell, [1939] 2 K.B. 187; [1939] 1 All E.R. 745; Digest Supp.; 160 L.T. 276 281, 282, 283, 286, 287, 288, 290, 291, 538, 539, 540
Marsh *v.* Isaacs (1876), 45 L.J.Q.B. 505; 30 Digest 249, *490* .. 320, 332
Mason *v.* Shrewsbury & Hereford Ry. Co. (1871), L.R. 6 Q.B. 578; 38 Digest 413, *1026*; 40 L.J.Q.B. 293; 25 L.T. 239 .. 157, 158
Mersey Steel & Iron Co. *v.* Naylor, Benzon & Co. (1884), 9 App. Cas. 434; 12 Digest 339, *2835*; 53 L.J.Q.B. 497; 51 L.T. 637 .. 81, 83
Mile End Old Town Vestry *v.* Whitby (1898), 78 L.T. 80; 31 Digest 304, *4482* .. 312, 316
Millar *v.* Refuge Assurance Co., Ltd., [1912] S.C. 37; 34 Digest 319, case *r* .. 558, 564
Millar, Son & Co. *v.* Radford (1903), 19 T.L.R. 575; 1 Digest 505, *1740* .. 348
Miller *v.* Addie (Robert) & Sons' Collieries, Ltd., [1934] S.C. 150 .. 208
Mills *v.* Farmer (1815), 1 Mer. 55; 8 Digest 348, *1423* .. 150, 151
Mills *v.* Haywood (1877), 6 Ch.D. 196; 30 Digest 477, *1391* .. 371, 375
Milne *v.* Commissioner of Police, [1939] 3 All E.R. 399; Digest Supp. .. 76, 80
Minister of National Revenue *v.* Royal Trust Co., [1931] S.C.R. 485; Digest Supp. 150
Mitchener *v.* Equitable Investment Co., Ltd., [1938] 2 K.B. 559; [1938] 1 All E.R. 303; Digest Supp.; 107 L.J.K.B. 316; 158 L.T. 176 .. 200, 201, 202
Mohammad Ibrahim Rowther *v.* Sheik Ibrahim Rowther (1922), T.L.R. 45 Mad. 308 44, 53
Monk *v.* Warbey, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194 108, 110
Morgan *v.* Ashcroft, [1938] 1 K.B. 49; [1937] 3 All E.R. 92; Digest Supp.; 106 L.J.K.B. 544; 157 L.T. 87 .. 352, 354, 355
Morgan *v.* Liverpool Corpn., [1927] 2 K.B. 131; Digest Supp.; 96 L.J.K.B. 234; 136 L.T. 622 .. 242, 252
Muir *v.* City of Glasgow Bank (1879), 4 App. Cas. 337; 43 Digest 736, *1713*; 40 L.T. 339 .. 406, 408
Mullan *v.* Forrester, [1921] 2 I.R. 412; 26 Digest 434, case *f* .. 242, 252
Munshee Buzloor Ruheem *v.* Shumsoon-nissa Begum (1867), 11 Moo. Ind. App. 551 44, 51
Murray *v.* Schwachman, Ltd., [1938] 1 K.B. 130; [1937] 2 All E.R. 68; Digest Supp.; 106 L.J.K.B. 354; 156 L.T. 407; 30 B.W.C.C. 466 .. 226, 228, 231, 232, 234
Murray *v.* Scott, Agnew *v.* Murray, Brimelow *v.* Murray (1884), 9 App. Cas. 519; 7 Digest 455, *5*; 53 L.J.Ch. 745; 51 L.T. 462; *varying* S.C. *sub nom. Re* Guardian Permanent Benefit Building Society (1882), 23 Ch.D. 440 .. 428, 454

National Trust Co. *v.* Minister of National Revenue, [1935] Ex.C.R. 167; [1936] 1 D.L.R. 129; Digest Supp. .. 150, 151

PAGES
Nelson *v.* Liverpool Brewery Co. (1877), 2 C.P.D. 311; 31 Digest 344, *4869*; 46 L.J.Q.B. 675 .. 242, 248, 252
Nevill *v.* Fine Art & General Insurance Co., [1897] A.C. 68; 32 Digest 72, *1010*; 66 L.J.Q.B. 195; 75 L.T. 606 .. 320, 323, 329
Newbould *v.* A.-G., [1931] P. 75; Digest Supp.; 100 L.J.P. 54; 144 L.T. 728 .. 261, 262
Niblett *v.* Midland Ry. Co. (1907), 96 L.T. 462; 34 Digest 86, *639* .. 281, 290
Nightingale *v.* Parsons, [1914] 2 K.B. 621; 1 Digest 505, *1741*; 83 L.J.K.B. 742; 110 L.T. 806 .. 348
Noble *v.* Harrison, [1926] 2 K.B. 332; 36 Digest 189, *316*; 95 L.J.K.B. 813; 135 L.T. 325 .. 242, 250
Nocton *v.* Ashburton (Lord), [1914] A.C. 932; 35 Digest 55, *493*; 83 L.J.Ch. 784; 111 L.T. 641 .. 428, 452
Norman *v.* Great Western Ry. Co., [1915] 1 K.B. 584; 38 Digest 352, *580*; 84 L.J.K.B. 598; 112 L.T. 266 .. 609, 612, 613, 615
Norton *v.* Cooper, *Re* Manby & Hawksford, *Ex p.* Bittleston (1856), 3 Sm. & G. 375; 42 Digest 342, *3864*; 26 L.J.Ch. 313; 29 L.T.O.S. 378 .. 485, 489, 509, 520

Otto *v.* Bolton Norris, [1936] 2 K.B. 46; [1936] 1 All E.R. 960; Digest Supp.; 105 L.J.K.B. 602; 154 L.T. 717 .. 4, 8
Ottoman Bank *v.* Chakarian, [1930] A.C. 277; Digest Supp.; 99 L.J.P.C. 97 .. 10, 11
Ottoman Bank of Nicosia *v.* Chakarian, [1938] A.C. 260; [1937] 4 All E.R. 570; Digest Supp.; 107 L.J.P.C. 15; 158 L.T. 1 .. 10, 11, 13
Ottoman Bank of Nicosia *v.* Dascalopoulos, [1934] A.C. 354; Digest Supp.; 103 L.J.P.C. 73; 151 L.T. 151 .. 10, 11, 13

Paddington Corpn. *v.* A.-G., [1906] A.C. 1; 33 Digest 50, *303*; 75 L.J.Ch. 4; 93 L.T. 673; *revsg.* S.C. *sub nom.* Boyce *v.* Paddington Borough Council, [1903] 2 Ch. 556 212, 213
Pailin *v.* Northern Employers' Mutual Indemnity Co., [1925] 2 K.B. 73; 29 Digest 407, *3210*; 133 L.T. 77; 18 B.W.C.C. 32 .. 571, 572, 576, 583, 594, 595, 597
Palmer *v.* Bateman, [1908] 2 I.R. 393; 36 Digest 25, case *125xi* .. 242, 248, 249
Parbati Kumari Debi *v.* Jagadis Chunder Dhabal (1902), I.L.R. Cal. 433 .. 44, 50
Payne *v.* Rogers (1794), 2 Hy. Bl. 350; 31 Digest 344, *4867* .. 241, 244, 252
Peck *v.* Tribune Co. (1909), 214 U.S. 185 .. 320, 322
Perkins *v.* Stevenson (Hugh) & Sons, Ltd., [1939] 3 All E.R. 697; Digest Supp.; 161 L.T. 149 .. 35, 36, 37, 38, 226, 227, 228, 230, 231, 233, 234
Petrie *v* MacFisheries, Ltd., [1939] 4 All E.R. 281; Digest Supp. .. 539, 540
Peyrae *v.* Wilkinson, [1924] 2 K.B. 166; 35 Digest 174, *48*; 93 L.J.K.B. 121; 130 L.T. 511 .. 137, 139
Phan Tiyok *v.* Lim Kyin Kauk (1930), I.L.R. 8 Ran. 57; Digest Supp. .. 44, 48, 49
Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K.B. 539; 36 Digest 61, *385*; 92 L.J.K.B. 389; 128 L.T. 690; *on appeal*, [1923] 2 K.B. 832 .. 124, 126, 131
Phillips *v.* Brooks, Ltd., [1919] 2 K.B. 243; 39 Digest 533, *1451*; 88 L.J.K.B. 953; 121 L.T. 249 .. 479, 480, 481
Polhill *v.* Walter (1832), 3 B. & Ad. 114; 35 Digest 40, *338*; 1 L.J.K.B. 92 .. 428, 429
Poliakoff *v.* News Chronicle, Ltd., [1939] 1 All E.R. 390; Digest Supp. .. 320, 329
Polemis & Furness, Withy & Co., *Re*, [1921] 3 K.B. 560; 36 Digest 29, *151*; *sub nom.* Polemis *v.* Furness, Withy & Co., 90 L.J.K.B. 1353; 126 L.T. 154 .. 523, 524, 527
Powell *v.* Powell, [1922] P. 278; 27 Digest 309, *2860*; 92 L.J.P. 6; 128 L.T. 26 534, 536, 537
Pretty *v.* Bickmore (1873), L.R. 8 C.P. 401; 31 Digest 345, *4881*; 28 L.T. 704 241, 245, 252
Prickett *v.* Badger (1856), 1 C.B.N.S. 296; 1 Digest 509, *1754*; 26 L.J.C.P. 33 411, 422, 425
Printing Machinery Co., Ltd. *v.* Linotype & Machinery, Ltd. [1912] 1 Ch. 566; 2 Digest 373, *385*; 81 L.J.Ch. 422; 106 L.T. 743 .. 69, 72
Pritchard *v.* Peto, [1917] 2 K.B. 173; 36 Digest 40, *244*; 86 L.J.K.B. 1292; 117 L.T. 145 .. 242, 250

Quarman *v.* Burnett (1840), 6 M. & W. 499; 34 Digest 126, *966*; 9 L.J.Ex. 308 .. 241, 244

R. *v.* Belfast Recorder, [1938] N.I. 10 .. 464, 466, 472, 476
R. *v.* Bradford Navigation Co. (1865), 6 B. & S. 631; 38 Digest 42, *247*; 34 L.J.Q.B. 191 .. 241, 244
R. *v.* Loxdale (1758), 1 Burr. 445; 42 Digest 663, *731* .. 464, 471
R. *v.* Pedly (1834), 1 Ad. & El. 822; 36 Digest 215, *582*; 3 L.J.M.C. 119 .. 242, 252
R. *v.* Twiss, [1918] 2 K.B. 853; 14 Digest 403, *4232*; 88 L.J.K.B. 20; 119 L.T. 680; 13 Cr. App. Rep. 177 .. 122, 123
R. *v.* Watson (1703), 2 Ld. Raym. 856; 26 Digest 433, *1517*; *sub nom.* R. *v.* Watts, 1 Salk. 357 .. 241, 244, 246
Raffety *v.* Schofield, [1897] 1 Ch. 937; 30 Digest 474, *1372*; 66 L.J.Ch. 448; 76 L.T. 648 .. 371, 377
Rahim at bae *v.* Hadji Jussap (1847), Perry's Oriental Cases, 110 .. 44, 51
Rapier *v.* London Tramways Co., [1893] 2 Ch. 588; 38 Digest 44, *258*; 63 L.J.Ch. 36; 69 L.T. 361 .. 241, 244
Reading Trust, Ltd. *v.* Spero, Spero *v.* Reading Trust, Ltd., [1930] 1 K.B. 492; Digest Supp.; 99 L.J.K.B. 186; 142 L.T. 361 .. 201, 202
Redfern *v.* Redfern, [1891] P. 139; 27 Digest 263, *2317*; 60 L.J.P. 9; 64 L.T. 68 .. 530
Rickards *v.* Lothian, [1913] A.C. 263; 36 Digest 194, *353*; 82 L.J.P.C. 42; 108 L.T. 225 208, 209
Roberts *v.* Security Co., [1897] 1 Q.B. 111; 29 Digest 415, *3248*; 66 L.J.Q.B. 119; 75 L.T. 531 .. 571, 581
Robinson, *Re*, McLaren *v.* Public Trustee, [1911] 1 Ch. 502; 32 Digest 518, *1761*; 80 L.J.Ch. 381; 104 L.T. 331 .. 261, 262
Rogers *v.* Ingham (1876), 3 Ch.D. 351; 35 Digest 93, *25*; 35 L.T. 677 .. 261, 262
Rose *v.* Collier (George Hurry), Ltd., [1939] W.N. 19; Digest Supp. .. 523, 528
Rosler *v.* Hilbery, [1925] 1 Ch. 250; Digest, Practice, 353, *679*; 94 L.J.Ch. 257; 132 L.T. 463 .. 17, 22, 23
Routledge *v.* Low (1868), L.R. 3 H.L. 100; 13 Digest 181, *165*; 37 L.J.Ch. 454; 18 L.T. 874; *affg.* (1865), 1 Ch. App. 42 .. 193, 194
Russell, *Re*, Dorell *v.* Dorell, [1895] 2 Ch. 698; 37 Digest 102, *370*; 64 L.J.Ch. 891; 73 L.T. 195 .. 333, 335
Rutcheputty Dutt Iha *v.* Rajunder Narain Rae (1839), 2 Moo. Ind. App. 132 .. 44, 50, 51

PAGES

Rylands *v.* Fletcher (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774 .. 208, 209

Sagar *v.* Ridehalgh (H.) & Son, Ltd., [1931] 1 Ch. 310; Digest Supp.; 100 L.J.Ch. 220; 144 L.T. 480 .. 281, 290
Sevenoaks Urban District Council *v.* Twynam, [1929] 2 K.B. 440; Digest Supp.; 98 L.J.K.B. 537; 141 L.T. 566 .. 465, 475
St. Anne's Well Brewery Co. *v.* Roberts (1928), 140 L.T. 1; Digest Supp. .. 242, 251, 252
St. James & St. John, Clerkenwell (Vestry) *v.* Feary (1890), 24 Q.B.D. 703; 38 Digest 231, *610*; 59 L.J.M.C. 82; 62 L.T. 697 .. 212, 213
St. Louis Breweries, Ltd. *v.* Apthorpe (1898), 79 L.T. 551; 28 Digest 29 *149*; 4 Tax Cas. 111 .. 117, 121
Salomon *v.* Salomon & Co., Salomon & Co. *v.* Salomon, [1897] A.C. 22; 9 Digest 34, *11*; 66 L.J. Ch. 35; 75 L.T. 426; *revsg.* S.C. *sub nom.* Broderip *v.* Salomon, [1895] 2 Ch. 323 .. 117, 120, 121
Samuel *v.* Adelaide Club, Ltd., [1934] 2 K.B. 69; Digest Supp.; 103 L.J.K.B. 561; 151 L.T. 116 .. 76, 80
Samuelson *v.* Producers Distributing Co., Ltd., [1932] 1 Ch. 201; Digest Supp.; 101 L.J.Ch. 168; 146 L.T. 37 .. 194
San Paulo (Brazilian) Ry. Co. *v.* Carter, [1896] A.C. 31; 28 Digest 27, *142*; 65 L.J.Q.B. 161; 73 L.T. 538; 3 Tax Cas. 407 .. 117, 121
Sandgate Urban District Council *v.* Kent County Council (1898), 79 L.T. 425; 26 Digest 265, *65* .. 158, 159
Sarat Chunder Dey *v.* Gopal Chunder Laha (1892), I.L.R. 20 Calc. 296; L.R. 19 Ind. App. 203; 21 Digest 300, case *1082iv* .. 260, 264
Schintz, *Re*, Schintz *v.* Warr, [1926] Ch. 710; Digest, Practice, 358, *716*; 95 L.J.Ch. 393; 135 L.T. 350 .. 17, 22, 23, 25
Selwood *v.* Towneley Coal and Fireclay Co., Ltd., [1939] 2 All E.R. 132; Digest Supp.; 32 B.W.C.C. 37; *revsd.*. [1939] 4 All E.R. 34 .. 226, 228, 233, 234
Sharpness New Docks and Gloucester & Birmingham Navigation Co. *v.* A.-G., [1915] A.C. 654; 26 Digest 581, *2716*; 84 L.J.K.B. 907; 112 L.T. 826; *revsg.*, [1914] 3 K.B. 1 .. 158, 159
Shaw *v.* London Express Newspaper, Ltd. (1925), 41 T.L.R. 475; 32 Digest 15, *57* 320, 322
Sheffield & South Yorkshire Permanent Building Society *v.* Aizlewood (1889), 44 Ch.D. 412; 7 Digest 461, *37*; 59 L.J.Ch. 34; 62 L.T. 678 427, 429, 430, 432, 441, 443, 444, 456, 457
Sheffield Waterworks Co. *v.* Bennett (1872), L.R. 7 Exch. 409; 43 Digest 1088, *209*; 41 L.J.Ex. 233; 27 L.T. 199; *affd.* (1873), L.R. 8 Exch. 196; 42 L.J.Ex. 121; 28 L.T. 509 .. 617, 619, 620
Sheppard *v.* Glossop Corpn., [1921] 3 K.B. 132; 38 Digest 34, *207*; 90 L.J.K.B. 994; 125 L.T. 520 .. 175, 176, 184
Simmons *v.* Liberal Opinion, Ltd., *Re* Dunn, [1911] 1 K.B. 966; 42 Digest 343, *3874*; 80 L.J.K.B. 617; 104 L.T. 264 .. 485, 520
Simpson *v.* Charrington & Co., Ltd., [1934] 1 K.B. 64; Digest Supp.; 103 L.J.K.B. 49; 150 L.T. 103; *on appeal*, [1935] A.C. 325; 104 L.J.K.B. 226; 152 L.T. 469 294, 295, 298, 299, 301, 308
Slaughter *v.* Sunderland Corpn. (1891), 60 L.J.M.C. 91; 38 Digest 184, *235*; 65 L.T. 250 .. 212, 213
Smith *v.* Birmingham Corpn. (1883), 11 Q.B.D. 195; 43 Digest 1088, *210*; 52 L.J.M.C. 81; 49 L.T. 25 .. 617, 620, 621
Smith *v.* Cawdle Fen, Ely (Cambridge), Comrs., [1938] 4 All E.R. 64; Digest Supp.; 160 L.T. 61 .. 175, 176, 184
Smith *v.* Chadwick (1884), 9 App. Cas. 187; 35 Digest 18, *106*; 53 L.J.Ch. 873; 50 L.T. 697 .. 428, 429
Smith *v.* Clay (1767), Amb. 645; 20 Digest 524, *2490* .. 260, 261
Smith *v.* Standard Steam Fishing Co., Burdon *v.* Gregson & Co., [1906] 2 K.B. 275; 24 Digest 917, *124*; 75 L.J.K.B. 640: 95 L.T. 42 .. 382, 384
Smith *v.* Wheatcroft (1878), 9 Ch.D. 223; 35 Digest 98, *71*; 47 L.J.Ch. 745; 39 L.T. 103 479, 480, 481
Société des Hôtels Le Touquet Paris-Plage *v.* Cummings, [1922] 1 K.B. 451; 35 Digest 173, *36*; 91 L.J.K.B. 288; 126 L.T. 513 .. 137, 138, 139
Solicitor, *Re* A, *Ex p.* Law Society, [1912] 1 K.B. 302; 42 Digest 399, *4515*; 81 L.J.K.B. 245; 105 L.T. 874 .. 485, 488
Spalding & Brothers *v.* Gamage (A. W.), Ltd. (1915), 84 L.J.Ch. 449; 43 Digest 264, *1018* .. 194
Stennett *v.* Hancock and Peters, [1939] 2 All E.R. 578; Digest Supp. .. 124, 131
Stephens *v* Dudbridge Ironworks Co., [1904] 2 K.B. 225; 34 Digest 492, *4070*; 73 L.J.K.B. 739; 90 L.T. 838; 6 W.C.C. 48 .. 226, 228, 231, 234
Stephens *v.* Hill (1842), 10 M. & W. 28; 42 Digest 394, *4420*; 11 L.J.Ex. 329 .. 485, 509
Stewart-Naylor *v.* London & Westminster Loan and Discount Co., Ltd. (1937), Unreported 201, 202
Stillwell *v.* New Windsor Corpn., [1932] 2 Ch. 155; Digest Supp.; 101 L.J.Ch. 342; 147 L.T. 306 .. 212
Stockdale *v.* Ascherberg, [1904] 1 K.B. 447; 31 Digest 305, *4489*; 73 L.J.K.B. 206; 90 L.T. 111; *affg.*, [1903] 1 K.B. 875 .. 312, 315, 317
Stoddart *v.* Hawke, [1902] 1 K.B. 353; 25 Digest 447, *403*; 71 L.J.K.B. 133; 85 L.T. 687 .. 76, 78
Sun Life Assurance Co. of Canada *v.* Smith (W. H.) & Son, Ltd. (1933), 150 L.T. 211; Digest Supp. .. 320, 322
Surendra Nath Roy *v.* Hiramani Barmani (1868), 12 Moo. Ind. App. 81 .. 44, 50, 53
Sutherland *v.* Mills (James), Ltd. (Executors), [1938] 1 All E.R. 283; Digest Supp. 226, 236
Sycamore *v.* Ley (1932), 147 L.T. 342; Digest Supp. .. 523, 528

Tan Ma Shwee Zin *v.* Tan Ma Ngwe Zin (1932), I.L.R. 10 Ran. 97; Digest Supp. 44, 45, 49
Tarrant *v.* Woking Urban Council, [1914] 3 K.B. 796; 26 Digest 555, *2503*; 84 L.J.K.B. 314; 111 L.T. 800 .. 212, 213
Tarry *v.* Ashton (1876), 1 Q.B.D. 314; 26 Digest 433, *1519*; 45 L.J.Q.B. 260; 34 L.T. 97 .. 242, 245, 247, 249, 250, 251, 252, 253, 254
Taylor *v.* Caldwell (1863), 3 B. & S. 826; 12 Digest 371, *3093*; 32 L.J.Q.B. 164; 8 L.T. 356 .. 411, 422

Taylor *v.* Chichester & Midhurst Ry. Co. (Directors, etc.) (1867), L.R. 2 Exch. 356; 13 Digest 356, *929*; 36 L.J.Ex. 201; 16 L.T. 703; *revsd. on other grounds* (1870), L.R. 4 H.L. 628 .. 428, 429, 430

Tennants (Lancashire), Ltd. *v.* Wilson (C. S.) & Co., Ltd., [1917] A.C. 495; 12 Digest 396, *3216*; 86 L.J.K.B. 1191; 116 L.T. 780; *revsg.* S.C. *sub nom.* Wilson & Co. *v.* Tennants (Lancashire), Ltd., [1917] 1 K.B. 208 .. 170, 173

Thom (or Simpson) *v.* Sinclair, [1917] A.C. 127; 34 Digest 320, *2619*; 86 L.J.P.C. 102; 116 L.T. 609; 10 B.W.C.C. 20 .. 558, 559, 561, 564, 566

Thompson *v.* British Berna Motor Lorries, Ltd. (1917), 33 T.L.R. 187; 34 Digest 84, *623* .. 347, 348

Thomson & Co. *v.* McNulty (1927), 71 Sol. Jo. 744; Digest Supp. .. 320, 322

Tilling (T.), Ltd. *v.* Dick Kerr & Co., [1905] 1 K.B. 562; 38 Digest 103, *737*; 74 L.J.K.B. 359; 92 L.T. 731 .. 31, 34

Todd *v.* Flight (1860), 9 C.B.N.S. 377; 31 Digest 345, *4879*; 30 L.J.C.P. 21; 3 L.T. 325 .. 241, 244, 245, 251, 252

Tolley *v.* Fry (J. S.) & Sons, Ltd., [1931] A.C. 333; Digest Supp.; 100 L.J.K.B. 328; 145 L.T. 1 .. 320, 322

Toulmin *v.* Millar (1887), 12 App. Cas. 746; 1 Digest 505, *1739*; 57 L.J.Q.B. 301; 58 L.T. 96 .. 347, 348, 349

Trollope (George) & Sons *v.* Caplan, [1936] 2 K.B. 382; [1936] 2 All E.R. 842; Digest Supp.; 105 L.J.K.B. 819; 155 L.T. 365 .. 411, 412, 414, 417, 419, 420, 422, 423, 425, 426

Trollope (George) & Sons *v.* Martyn Bros., [1934] 2 K.B. 436; Digest Supp.; 103 L.J.K.B. 634; 152 L.T. 88 .. 411, 412, 414, 417, 419, 420, 422, 423, 425, 426

Turner *v.* Thompson (1888), 13 P.D. 37; 11 Digest 332, *214*; 58 L.T. 387 .. 260, 262, 266

Universo Insurance Co. of Milan *v.* Merchants Marine Insurance Co., [1897] 2 Q.B. 93; 29 Digest 82, *416*; 66 L.J.Q.B. 564; 76 L.T. 748 .. 571, 581

Upton *v.* Great Central Ry. Co., [1924] A.C. 302; 34 Digest 276, *2336*; 93 L.J.K.B. 224; 130 L.T. 577; 16 B.W.C.C. 269 .. 558, 564

Valpy *v.* St. Leonard's Wharf Co., Ltd. (1903), 67 J.P. 402; 31 Digest 303, *4477* 313, 316, 317, 318

Venn *v.* Tedesco, [1926] 2 K.B. 227; 36 Digest 131, *871*; 95 L.J.K.B. 866; 135 L.T. 108 .. 31, 33

Verge *v.* Somerville, [1924] A.C. 496; Digest Supp.; 93 L.J.P.C. 173; 131 L.T. 107 150, 151

Wagstaffe *v.* Bentley, [1902] 1 K.B. 124; Digest, Practice, 490, *1672*; 71 L.J.K.B. 55, 57; 85 L.T. 744 .. 40

Walker *v.* Bletchley Flettons, Ltd., [1937] 1 All E.R. 170; Digest Supp. .. 226, 235

Warburton *v.* Co-operative Wholesale Society, Ltd., [1917] 1 K.B. 663; 12 Digest 378, *3122*; 86 L.J.K.B. 529; 116 L.T. 107; 10 B.W.C.C. 93 .. 281, 287

Ward, *Re* (1862), 31 Beav. 1; 42 Digest 351, *3993* .. 485, 520

Warner *v.* Couchman, [1912] A.C. 35; 34 Digest 318, *2604*; 81 L.J.K.B. 45; 105 L.T. 676; 5 B.W.C.C. 177; *affg.*, [1911] 1 K.B. 351 .. 558, 564, 567

Washington Post *v.* Kennedy (1925), 3 Fed. (2nd) Rep. 256 .. 320, 322

Waters *v.* Monarch Life Assurance Co. (1856), 5 E. & B. 870; 29 Digest 311, *2568*; 25 L.J.Q.B. 102; 26 L.T.O.S. 217 .. 602, 604

Watson *v.* Russell (1864), 5 B. & S. 968; 6 Digest 87, *643*; 34 L.J.Q.B. 93; 11 L.T. 641 352, 357

Watt *v.* Watt, [1905] A.C. 115; 32 Digest 166, *2020*; 74 L.J.K.B. 438; 92 L.T. 480 320, 332

Weavings *v.* Kirk & Randall, [1904] 1 K.B. 213; 24 Digest 920, *145*; 73 L.J.K.B. 77; 89 L.T. 577 .. 382, 385, 399

Weldon *v.* Dicks (1878), 10 Ch.D. 247; 13 Digest 177, *131*; 48 L.J.Ch. 201; 39 L.T. 467 .. 193, 198

Wenlock (Baroness) *v.* River Dee Co. (1883), 36 Ch.D. 675, n.; 13 Digest 367, *1002*; 57 L.T. 402, n.; *affd.* (1885), 10 App. Cas. 354; *subsequent proceedings* (1887), 19 Q.B.D. 155; (1887), 36 Ch.D. 674; *affd.* (1888), 38 Ch.D. 534 .. 428, 440, 453

West Derby Union *v.* Metropolitan Life Assurance Society, [1897] A.C. 647; 42 Digest 659, *680*; 66 L.J.Ch. 726; 77 L.T. 284; *affg.* S.C. *sub nom.* West Derby Union Guardians *v.* Metropolitan Life Assurance Society, West Derby Union Guardians *v.* Priestman, [1897] 1 Ch. 335 .. 464, 470

Weston *v.* Collins (1865), 5 New Rep. 345; 30 Digest 475, *1378*; 34 L.J.Ch. 353; 12 L.T. 4 .. 371, 374

Westropp *v.* Equitable Investment Co., Ltd., Unreported .. 201, 202

White *v.* Washington (1738), Cooke, Pr. Cas. 152; 42 Digest 352, *4006* .. 485, 489

Whiteman Smith Motor Co., Ltd. *v.* Chaplin, [1934] 2 K.B. 35; Digest Supp.; 103 L.J.K.B. 328; 150 L.T. 354 .. 294, 295, 296, 305, 310

Wilchick *v.* Marks & Silverstone, [1934] 2 K.B. 56; Digest Supp.; 103 L.J.K.B. 372; 151 L.T. 60 .. 242, 252

Wilkins *v.* Leighton, [1932] 2 Ch. 106; Digest Supp.; 101 L.J.Ch. 385; 147 L.T. 495 242

Wilkinson *v.* Bury Water Board (1905), 92 L.T. 417; 43 Digest 1089, *215* .. 617, 620, 621

Wilkinson *v.* Coverdale (1793), 1 Esp. 74; 12 Digest 223, *1849* .. 4, 5, 8, 175, 185

Williams *v.* Neath Assessment Committee (1935), 154 L.T. 261; Digest Supp. .. 269, 275

Williams *v.* North China Insurance Co. (1876), 1 C.P.D. 757; 29 Digest 89, *473*; 35 L.T. 884 .. 602, 607

Williams *v.* Williams, [1939] 3 All E.R. 825; Digest Supp.; 161 L.T. 202 .. 73, 74, 75

Willis, *Re*, Shaw *v.* Willis, [1921] 1 Ch. 44; 8 Digest 349, *1431*; 90 L.J.Ch. 94; 124 L.T. 290 .. 150, 151

Wily *v.* Wily, [1918] P. 1; 27 Digest 276, *2460*; 87 L.J.P. 31; 117 L.T. 703 534, 536, 537

Wombwell's Settlement, *Re*, Clerke *v.* Menzies, [1922] 2 Ch. 298; 27 Digest 457, *4752*; 92 L.J.Ch. 18; 127 L.T. 295 .. 260, 261, 262, 266

Wood *v.* Cooper, [1894] 3 Ch. 671; 31 Digest 164, *2975*; 63 L.J.Ch. 845; 71 L.T. 222 212

Yorkshire Railway Wagon Co. *v.* Maclure (1882), 21 Ch.D. 309; 26 Digest 17, *54*; 51 L.J.Ch. 857; 47 L.T. 290 .. 428, 429

Yonge *v.* Toynbee, [1910] 1 K.B. 215; 42 Digest 335, *3785*; 79 L.J.K.B. 208; 102 L.T. 57 485, 520, 521

Youssoupoff *v.* Metro-Goldwyn-Mayer Pictures, Ltd. (1934), 50 T.L.R. 581; Digest Supp. 320, 322

INDEX

PAGE

Accident, cause of, onus of proof, breach of statutory duty to fence dangerous machinery 225

Acquiescence, wife's delay in taking nullity proceedings, loss of right to restitution of gift during widowhood 260

Adultery, wife's, subsequent to decree *nisi*, principles to be applied 378

Advances, building society, mortgage of freeholds, collateral charge on fund under pool agreement, validity, misrepresentation 427

AGENCY.

Commission—Agent for sale of property—Property purchased under compulsory powers—Agent introducing official of authority exercising those powers [G. T. HODGES & SONS *v.* HACKBRIDGE PARK RESIDENTIAL HOTEL, LTD.] 347

——, *Contract to pay commission on completion of sale of property—Willing purchaser found—Justification of refusal to complete—Transaction carried through by sale of shares in company and not by sale of company's property* [COOPER *v.* LUXOR (EASTBOURNE), LTD.] 411

Allurement, child injured on object not alleged to be the allurement 92

Alternative remedies, receipt of workmen's compensation, bar to action for damages 34

——, ——, whether contract was for infant's benefit 225

ANIMALS.

Liability of owner—Negligence—Ordinary consequences of negligence—Scienter—Horse left unattended attacking passer-by [ALDHAM *v.* UNITED DAIRIES (LONDON), LTD.] 522

Arbitration, action to enforce award, claim for rectification 68

Auctioneers, purchase price provided by, bankruptcy of purchaser, whether property in goods in purchaser or auctioneers 554

BANKRUPTCY.

Bankrupt's business carried on by trustee in bankruptcy—Guarantee against loss given by defendant—Loss incurred—Action by trustee to recover loss—Whether action maintainable—Public policy—Illegal contract—Consideration—Bankruptcy Act, 1914 (*c.* 59), *s.* 56 (1) [CLARK *v.* SMITH] 59

Deed of arrangement—Trustee—Liability—Order given as trustee [HUNT BROTHERS *v.* COLWELL] 406

Bankruptcy, petition, emergency powers, application to file in county court, leave given in High Court to enforce judgment or order, "appropriate court" 337

——, purchaser of ascertained goods, purchase price provided by auctioneers, whether property in goods in purchaser or auctioneers 554

Belligerent state, right of shipper to ship on ship of 88

Bill of sale, loan secured by, copy attached to memorandum of loan agreement, sufficiency of memorandum 200

PAGE

BILLS OF EXCHANGE.

Liability of parties—Acceptor—Acceptance under a mistake of fact—Acceptance procured by fraud of third party—Bill incomplete when accepted [AYRES *v.* MOORE] 351

BUILDING SOCIETIES.

Advances—Security upon which advances can be made—Mortgage of freeholds—Collateral charge on fund—Pool agreement—Validity—Misrepresentation—Building Societies Act, 1874 (*c.* 42), *s.* 13 [HALIFAX BUILDING SOCIETY *v.* SALISBURY] 427

Car, reconditioned, sale of, opportunity for examination of car, no expectation that opportunity would be used, liability of supplier in tort 123

Charitable institution, income accumulating in Canada in trust for unascertained persons, liability for interest on unpaid tax 140

Charterparty, for two voyages, severability, deviation on first voyage 81

Child, injury, allurement to danger by an object not dangerous, obvious danger 92

Children, allowance, income tax, relief, whether children entitled to maintenance money in their own right 186

C.i.f. contract, insurance, war risk 88

Clerk, solicitor leaving conduct of case to, inadequate affidavits of documents, false to knowledge of clerk, whether solicitor can be made personally responsible for costs 484

Collapse, meaning of, insurance of premises 113

Commission, justification of refusal to complete, transaction carried through by sale of shares in company and not by sale of company's property 411

——, property purchased under compulsory powers, agent introducing official of authority exercising those powers 347

Compensation, compulsory purchase, premises of subsidiary company 116

COMPULSORY PURCHASE.

Acquisition of premises on which business of subsidiary company carried on—Right of parent company to claim compensation for disturbance and removal—Lands Clauses Consolidation Act, 1845 (*c.* 18), *s.* 121 [SMITH, STONE & KNIGHT, LTD. *v.* BIRMINGHAM CORPORATION] 116

Contract, employment, implied term, no wages during illness 281, 538

——, infant, whether for benefit of, alternative remedies, election, receipt of compensation 225

Conveyance, school, reverter on cesser of use of school, conveyance by owner in fee simple for full value 140

Convictions, court-martial, convictions quashed, effect on sentence 102

Costs, payment into court, application at opening of trial to take money out, defendant's costs 39

——, ——, remitted action, payment into court of three separate sums, three plaintiffs, taxation, scale applicable 339

——, poor person, burden on solicitor, preliminary issue, proportion of profit costs 616

PAGE

COUNTY COURT.

Costs—Remitted action—Payment into court—Three plaintiffs—Three separate sums paid into court—Taxation in respect of each sum paid in—Scale applicable—County Courts Act, 1934 (*c*. 53), *s*. 73 [HAILE *v*. WEST] 339

Counsel, speeches of, trial before jury, no witnesses called for defence, right of defendants' counsel to invite jury to stop case 568

Coupons, football pool, receipt of, offence 76

Court, discretion of, execution on judgment, principles on which discretion exercised, existence of other debts, emergency powers 169

Court-martial, confirmation of sentences, some convictions quashed 102

Covenant, positive, noted on Land Register, whether binding on subsequent purchaser 457

CRIMINAL LAW.

Evidence — Admissibility — Character of accused—Accused calling evidence restricted to his character in regard to women—Evidence of general bad character admissible [R. *v*. WINFIELD] 164

——, ——, *Indecent postcards found in possession of prisoner charged with gross indecency* [R. *v*. GILLINGHAM] 122

Currency, rate of exchange, payment for goods sold, distinction between payment in foreign country and payment into court in this country 136

Custom, trade, wages during illness, employee engaged at weekly wage fixed upon hourly basis.. 538

Damage, frost bursting water pipes, defendant having good reason to believe that water turned off 207

——, riparian owners, possibility of alternative method of exercising statutory powers, onus of proof.. 157

Damages, motor insurance claim, absolute conduct and control of proceedings, settlement without consulting insured, liability of insured for first £5 of sum paid in settlement.. 204

——, possibility of death in war 85

Dancer, heel of shoe becoming detached and hitting member of audience, liability of producer of variety programme, whether dancer servant or independent contractor, standard of care required 609

Dangerous goods, liability of supplier, sale of reconditioned car, accident due to defective condition of car, opportunity for examination of car, no expectation that opportunity would be used.. .. 123

Deed of arrangement, trustee, liability, order given as trustee 406

Depreciation, allowances, income tax, general instructions, exercise of discretion 254

Desertion, parties continuing to live in separate parts of same house, husband refusing suggestion of reconciliation .. 533

——, supervening insanity, presumption of *animus deserendi* 73

Deviation, charter for two voyages, entire contract 81

Discovery, divorce, adultery, conduct conducing, documents relating to association of husband with named women 529

Discretion, of court, execution on judgment, principles on which discretion exercised, existence of other debts, emergency powers.. 169

DIVORCE.

Desertion—Parties continuing to live in separate parts of same house—Husband refusing suggestion of reconciliation—Matrimonial Causes Act, 1937 (*c*. 57), *s*. 2 [SMITH *v*. SMITH] 533

PAGE

——, *Supervening insanity of deserting respondent—Animus deserendi of certified lunatic — Presumption — Matrimonial Causes Act*, 1937 (*c*. 57), *s*. 2 [RUSHBROOK *v*. RUSHBROOK] 73

Discovery — Conduct conducing — Documents relating to association of husband with named women—Supreme Court of Judicature (Consolidation) Act, 1925 (*c*. 49), *s*. 198 [CAMPBELL *v*. CAMPBELL] 529

Wife's petition—Decree nisi—Subsequent adultery — Intervention by King's Proctor—Conduct of petitioner—Principles to be applied [REEVES *v*. REEVES].. 378

Drainage rates, owner's rate, tenant covenanting to pay "all rates, taxes and outgoings," whether entitled to be recouped by landlord 312

Driver, hours of duty, driver standing by while lorry loading.. 54

EDUCATION.

School—Conveyance under School Sites Acts—Reverter on cesser of use of school—Conveyance by owner in fee simple for full value—Enrolment—Charitable Uses Act, 1736 (*c*. 36), *s*. 10—*School Sites Act*, 1841 (*c*. 38), *s*. 2—*School Sites Act*, 1844 (*c*. 37), *s*. 3—*School Sites Act*,1849 (*c*. 49), *s*. 4—*Public Parks, Schools and Museums Act*, 1871 (*c*. 13), *ss*. 3, 4 [*Re* CAWSTON'S CONVEYANCE, ST. LUKE, BROMLEY COMMON (VICAR AND CHURCHWARDENS) *v*. CAWSTON].. .. 140

Election, workmen's compensation and common law action, action barred by receipt of compensation 34

——, ——, whether contract was for infant's benefit 225

Embezzlement, employee causing loss to firm of employers by, indemnity policy, "all losses" 358

EMERGENCY LEGISLATION.

Foreclosure proceedings—Leave to commence—Parties to application—Inability to pay due to war—Onus of proof—Courts (Emergency Powers) Act, 1939 (*c*. 67), *s*. 1 (2) (*b*), (4) [TOMLEY *v*. GOWER AND MCADAM].. 460

Leave to enforce judgment or order—Execution on judgment—Discretion of court—Principles on which discretion exercised—Existence of other debts—Courts (Emergency Powers) Act, 1939 (*c*. 67), *s*. 1 [A. *v*. B.] 169

——, *Leave given in High Court—Application to file bankruptcy petition in county court—"Appropriate court"—Courts (Emergency Powers) Act*, 1939 (*c*. 67), *s*. 1 (1) (2) (*a*)—*Courts (Emergency Powers) Rules*, 1939 (*S.R. & O*., 1939, *No*. 995), *rr*. 2, 4 [*Re* A DEBTOR, *Ex parte* DUNN TRUST, LTD.] 337

Employee, local authority, resolution to grant gratuity to be paid in weekly instalments, whether *ultra vires*, enforceability by employee 165

——, wages during illness, employee engaged at weekly wage fixed upon hourly basis, trade custom 538

Employer, insolvency of, liability of insurers to workman, mutual indemnity society, non-payment of calls 570

Employment, contract of, implied term in, no wages during illness.. .. .. 281, 538

——, national health insurance, bailee of motor car used for playing for hire, whether in employment of bailor .. 277

——, ——, remuneration in excess of £250 per annum, unpaid assistance of employee's wife, whether value of such assistance may be deducted from remuneration 291

——, ——, sub-postmaster, remuneration by scale payment 269

PAGE

Evidence, admissibility, character of accused 164

——, ——, indecent postcards found in possession of prisoner charged with gross indecency 122

EXECUTION.

Leave to issue—Under Courts (Emergency Powers) Act, 1939—Discretion of court—Existence of other debts—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 [A. *v.* B.] 169

FACTORIES AND WORKSHOPS.

Dangerous machinery—Breach of statutory duty—Breach must be cause of accident—Onus of proof—Factory and Workshop Act, 1901 (c. 22), s. 10 [STIMSON *v.* STANDARD TELEPHONES & CABLES, LTD.] 225

Shipbuilding yard—Vessel under construction—Defective staging—Occupier—Occupation of part of a vessel—Factory and Workshop Act, 1901 (c. 22), ss. 79, 82, 104, 140, 141, 142, 149, 151—Shipbuilding Regulations, 1931 (S. R. & O., 1931, No. 133), regs. 11, 13 [SMITH *v.* CAMMELL LAIRD & CO., LTD.] 381

Fire insurance, double insurance clause, insurance of premises by lessor and lessee, equitable interest, ratification of insurance, reinstatement of premises 601

Fitness of premises, letting with open gaspipe 4

——, rent not exceeding £40 per annum, exclusive rent.. 616

Football pool, receipt of coupons and money, offence 76

Foreclosure proceedings, emergency legislation, leave to commence, parties to application.. 460

Forfeiture clause, life interest forfeited, rule against perpetuities 332

Fraud, acceptance of bill of exchange procured by third party by fraud, bill incomplete when accepted 351

Frost, damage from burst pipes, defendant having good reason to believe that water turned off 207

GAMING.

Betting—Football pool—Premises used to "effect" betting transactions—Meaning of "effect"—Coupons accepted at premises other than those of respondent—Betting and Lotteries Act, 1934 (c. 58), s. 3 (2) [STOVELL *v.* JAMESON] 76

Gaspipe, left open with gas turned off at main, letting of premises 4

Gift, determination on marriage, delay by wife in taking nullity proceedings, acquiescence, loss of right to restitution 260

Gratuity, resolution to grant, enforceability by employee, payment in weekly instalments, whether *ultra vires*.. .. 165

Guarantee, to trustee in bankruptcy carrying on business, not for beneficial winding up 59

Horse, attacking passer-by when left unattended, *scienter*, ordinary consequences of negligence, liability of owner 522

Horse-box, used by trainer, type of licence required 57

Household, member of, definition, exception in third-party risks insurance policy 345

Identity, mistake, lease, fraudulent misrepresentation by lessee, lessor's right to avoid lease 478

Illegality, trustee in bankruptcy carrying on business, not for beneficial winding up, effect on guarantee given to trustee 59

Illness, wages, implied term in contract of employment 281, 538

PAGE

——, ——, ——, employee engaged at weekly wage fixed upon hourly basis, trade custom 538

INCOME TAX.

Reliefs—Children's allowance—Sums over £50 payable to guardian for maintenance of children—Whether children entitled to such sums in their own right—Finance Act, 1920 (c. 18), s. 21 [STEVENS *v.* TIRARD] 186

Trade—Succession to trade—Division of manufacture—One process carried on by subsidiary companies—Remaining process carried on by parent company—Sales effected by another subsidiary company—Merger of manufacturing companies but not of selling company—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 11 (2)—Finance Act, 1926 (c. 22), s. 32 (2) [BRITON FERRY STEEL CO., LTD. *v.* BARRY] 541

Income tax, allowances, depreciation, general instructions governing allowances, exercise of discretion, new company taking over business of company ceasing to exist 254

——, income accumulating in Canada in trust for unascertained persons, charitable institution, liability for interest on unpaid tax.. 149

Infant, contract for benefit of, receipt of compensation, alternative remedies .. 225

Insanity, supervening, desertion, presumption as to *animus deserendi*.. .. 73

Insolvency, employer, liability of insurers to workman, mutual indemnity society, non-payment of calls 570

INSURANCE.

Accident insurance—Subsidence or collapse of building—Construction of policy—Meaning of "subsidence" and "collapse" [DAVID ALLEN & SONS BILLPOSTING, LTD. *v.* DRYSDALE] 113

Fire insurance—Double insurance clause—Insurance of premises by lessor and lessee—Equitable interest—Rectification of insurance—Reinstatement of premises—Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83 [PORTAVON CINEMA CO., LTD. *v.* PRICE AND CENTURY INSURANCE CO., LTD.] 601

Indemnity policy—"All losses"—Loss due to embezzlement by employee [GODDARD & SMITH *v.* FREW] 358

Motor insurance—Claim for damages—Absolute conduct and control of proceedings—Settlement without consulting insured—Liability of insured for first £5 of sum paid in settlement [BEACON INSURANCE CO., LTD. *v.* LANGDALE] .. 204

——, *Third party risks—Exception—"Member of the assured's household"* [ENGLISH *v.* WESTERN].. 345

——, ——, *Policy issued upon proposal form containing false statements—Policy subsequently avoided by court—"Causing or permitting" an uninsured car to be driven* [GOODBARNE *v.* BUCK].. 107

Insurers, liability to workman, insolvency of employer, mutual indemnity society, non-payment of calls 570

Interest, liability for, on unpaid tax, charitable institution, income accumulating in Canada in trust for unascertained persons 149

INTOXICATING LIQUORS.

Licence—New licence—Increase of 25 per cent. of population—Whether increase relates to city or ward or district electoral division—Government of Ireland Act, 1920 (c. 67), s. 49 (a) (b)—Intoxicating Liquor Act (Northern Ireland), 1923 (c. 12), s. 9 (c)—Intoxicating Liquor and Licensing Act (Northern Ireland), 1927 (c. 21), s. 3 (6) (iv) [JENNINGS *v.* KELLY] 464

PAGE

Judgment, execution on, discretion of court, principles on which discretion exercised, existence of other debts, emergency powers 169

Justification, refusal to complete sale of property, commission 411

LAND DRAINAGE.

Catchment board—River-wall—Duty to repair—Liability for misfeasance—Negligent repair—Land Drainage Act, 1930 (*c.* 44), *s.* 34 [Kent and Porter *v.* East Suffolk Rivers Catchment Board] 174

Drainage rates—Owner's rate—Lease in which tenant covenants to pay " all rates, taxes and outgoings "—Owner's rate paid by tenant—Whether entitled to be recouped by landlord [Smith *v.* Smith] 312

LAND REGISTRATION.

Notice—Positive covenant noted on register—Whether binding on subsequent purchaser—Land Registration Act, 1925 (*c.* 21), *s.* 20 [Cator *v.* Newton and Bates] 457

LANDLORD AND TENANT.

Fitness of property for human habitation—Condition implied by statute—Rent not exceeding £40 per annum—Whether inclusive or exclusive rent—Housing Act, 1936 (*c.* 51), *s.* 2 [Rousou *v.* Photi (Gort Estates Co., Third Party)] .. 616

——, *Escape of gas—Removal of gas fire—Fitting not required by tenant removed by landlord and previous occupier—Whether contract to remove* [Davis *v.* Foots] 4

Lease—Mistake as to identity of lessee—Fraudulent misrepresentation by lessee—Lessor's right to avoid lease [Sowler *v.* Potter] 478

Option to purchase—Interest on purchase money to be payable on expiration of notice—Lease then determined—Liability of original lessees for rent [Cockwell *v.* Romford Sanitary Steam Laundry, Ltd.] 370

Rent restriction—" House or a part of a house let "—House not let before 1928 *—No registration of house as decontrolled —Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (*c.* 17), *s.* 12 (2) *—Rent and Mortgage Interest Restrictions Act,* 1923 (*c.* 32), *s.* 2 (1)*—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1938 (*c.* 26), *s.* 4 [Schaffer *v.* Ross] 363

Repairs—Want of—Collapse of house on adjoining premises—Landlord liable to do repairs—Knowledge of landlord [Wringe *v.* Cohen] 241

Lease, covenant by tenant to pay " all rates, taxes and outgoings," owner's drainage rate paid by tenant, whether entitled to be recouped by landlord .. 312

Leave, emergency legislation, foreclosure proceedings, leave to commence, parties to application.. 460

Lessee, identity, mistake as to, fraudulent misrepresentation by lessee, lessor's right to avoid lease 478

——, insurance of premises by lessor and, double insurance clause, equitable interest, reinstatement of premises .. 601

LIBEL.

True statement about existing person of same name as plaintiff—Whether referable also to plaintiff [Newstead *v.* London Express Newspaper, Ltd.] 319

Licence, increase of 25 per cent. of population, whether increase relates to city or ward or district electoral division 464

PAGE

Life interest, forfeiture of, rule against perpetuities 332

Limitation of actions, public authority, action against officer of authority .. 30

Loan, memorandum of agreement, whether possible to read together with copy of bill of sale attached to memorandum.. 200

LOCAL GOVERNMENT.

Gratuity to employee dismissed on ground of ill-health—Resolution to grant—Enforceability by employee—Resolution to pay gratuity in weekly instalments—Whether ultra vires—Poplar Borough Council Superannuation and Pensions Act, 1911 (*c. cii*), *s.* 8 (2) [Holloway *v.* Poplar Borough Council] 165

Machinery, dangerous, breach of statutory duty to fence causing accident, onus of proof.. 225

Maintenance, children, guardian paying sums for, whether children entitled to such sums in their own right, income tax relief.. 186

Marriage, gift determining on, marriage annulled on ground of husband's incapacity, wife's delay in taking proceedings, acquiescence 260

MASTER AND SERVANT.

Remuneration—Wages during illness—Employee engaged at weekly wage fixed upon hourly basis—Trade custom [Hancock *v.* B.S.A. Tools, Ltd.] 538

——, ——, *Notice in place of employment that half pay would be paid ex gratia during illness—Employee accepting such payments—Claim for full wages in respect of later illness—Implied term in contract of employment* [Petrie *v.* MacFisheries, Ltd.] 281

Medical officer, county hospital, protection of Public Authorities Protection Act 30

Memorandum, loan agreement, loan secured by bill of sale, copy of bill of sale attached to memorandum, whether two documents can be read together .. 200

Misfeasance, liability for, repair of river-wall, negligent repair 174

Misrepresentation, advances by building society, mortgage of freeholds, collateral charge on fund, pool agreement, validity 427

——, fraudulent, by lessee, mistake of identity as to lessee, lessor's right to avoid lease 478

MISTAKE.

Determination of gift on marriage—Marriage annulled on ground of husband's incapacity—Wife waiting 12 *years before taking proceedings—Acquiescence—Loss of right to restitution* [*Re* Eaves, Eaves *v.* Eaves] 260

Mistake as to identity of lessee—Mistake induced by fraudulent misrepresentation by lessee—Lessor's right to avoid lease [Sowler *v.* Potter] 478

Rectification—Agreement containing arbitration clause—Parties proceeding to arbitration and award made—Claim for rectification of agreement in action to enforce award—Estoppel [Crane *v.* Hegeman-Harris Co., Inc.] 68

MONEY.

Currency—Rate of exchange—Payment for goods sold—Distinction between payment in foreign country and payment into court in this country [Madeleine Vionnet et Cie. *v.* Wills] 136

MONEYLENDING.

Memorandum—Loan secured by bill of sale—Copy of bill of sale attached to memorandum—Whether two documents can be read together—Moneylenders Act, 1927 (*c.* 21), *s.* 6 [Tooke *v.* T. W. Bennett & Co., Ltd.].. 200

PAGE

Mortgage, building society, collateral charge on fund under pool agreement, validity, misrepresentation 427
Motor car, bailee using car for plying for hire, whether in employment of bailor, national health insurance 277
——, insurance, claim for damages, absolute conduct and control of proceedings, settlement without consulting insured, liability of insured for first £5 of sum paid in settlement 204
——, ——, third-party risks, exception, "member of the assured's household" 345
Motor vehicle, hours of duty, driver standing by during loading of vehicle.. 54
Mutual indemnity society, non-payment of calls, insolvency of employer, liability of insurers to workman.. 570

National health insurance, employment, bailee of motor car used for plying for hire, whether in employment of bailor 277
——, ——, remuneration in excess of £250 per annum, unpaid assistance of employee's wife, whether value of such assistance may be deducted from remuneration 291
——, ——, sub-postmaster, remuneration by scale payment.. 269

NEGLIGENCE.

Children — Allurement — Child injuring himself upon obvious danger not part of the allurement [MORLEY *v.* STAFFORDSHIRE COUNTY COUNCIL] 92
Dangerous goods—Liability of supplier—Sale of reconditioned car—Accident due to defective condition of car—Opportunity for examination of car—No expectation that opportunity would be used [HERSCHTHAL *v.* STEWART & ARDERN, LTD.] 123
Escape — Water — Frost — Damage from burst pipe—Defendant having good reason to believe that water turned off [TILLEY *v.* STEVENSON].. 207
Negligence causing death—Damages—Possibility of death in war as combatant or as civilian [HALL *v.* WILSON].. 85
Producer of variety programme—Heel of dancer's shoe becoming detached and hitting member of audience—Whether dancer servant or independent contractor—Standard of care required [FRASER-WALLAS *v.* ELSIE AND DORIS WATERS (A FIRM)] 609
Volenti non fit injuria—Watchman returning to burning premises [D'URSO *v.* SANSON] 26

Negligence, horse left unattended attacking passer-by, ordinary consequences of negligence, *scienter* 522
——, river-wall, repair of, liability for misfeasance 174
Novus actus interveniens, watchman returning to burning premises.. 26

NUISANCE.

House in disrepair—Collapse of house on adjoining premises—Owner liable to do repairs—Knowledge of want of repair [WRINGE *v.* COHEN] 241

Nullity, decree of, in respect of second marriage, whether gift during widowhood restored. 260

Occupier, vessel under construction in shipbuilding yard, defective staging .. 381

Payment into court, application at opening of trial to take money out, defendant's costs 39
Pipe, frost bursting, defendant having good reason to believe that water turned off 207
Policy, third-party risks, policy secured by misrepresentation, policy only voidable and not void 107

PAGE

Pool agreement, building society, mortgage of freeholds, collateral charge on fund, validity, misrepresentation .. 427
Poor person, costs, burden on solicitor, proportion of profit costs 616
Possession, things in possession of prisoner, evidence 122

PRACTICE.

Costs—Action—Payment of money into court with denial of liability—Money left in court until day of trial—Application for leave to take money out of court—Whether defendant entitled to his costs from after date of payment in—R.S.C., Ord. 22, *r.* 3 [GRIGGS *v.* PETTS] 39
——, *Poor person—Burden on solicitor—Proportion of profit costs—R.S.C., Ord.* 16, *r.* 31B [ROUSOU *v.* PHOTI (GORT ESTATES CO., THIRD PARTY)] 616
New trial—When granted—Smallness of damages jury can possibly award [NEWSTEAD *v.* LONDON EXPRESS NEWSPAPER, LTD.] 319
Service out of the jurisdiction—Action properly brought against defendant within jurisdiction—Real defendant to action—Discretion of court—Non-disclosure not amounting to attempt to deceive court—R.S.C., Ord. 11, *r.* 1 (*g*) [ELLINGER *v.* GUINNESS, MAHON & CO., FRANKFURTER BANK A.-G. AND METALL GESELLSCHAFT A.-G.] 16
Trial — Hearing — Trial before jury — Speeches of counsel—No witnesses called for defence—Right of defendants' counsel to invite jury to stop case [ALEXANDER *v.* H. BURGOINE & SONS, LTD.] 568

PRIVY COUNCIL.

Canada—Copyright—Title of song used as title of talkie film—Infringement—Performing right—Literary copyright—Passing off—Copyright Act, 1842 (*c.* 45) *—Copyright (Musical Compositions) Act*, 1882 (*c.* 40)*—Copyright Act*, 1911 (*c.* 46)*—Canadian Copyright Act*, 1921 (*R.S.C.*, 1927, *c.* 32)*—Canadian Copyright Amendment Act*, 1931 (*c.* 8), *ss.* 2 (*v*), 3 [FRANCIS DAY AND HUNTER, LTD. *v.* TWENTIETH CENTURY FOX CORPORATION, LTD.] 192
——, *Income tax—Allowances—Depreciation—General instructions governing allowances—Exercise of discretion—New company taking over business of company ceasing to exist—Income War Tax Act* (*R.S.C.*, 1927, *c.* 97), *ss.* 3, 5 (*a*) (*b*), 58, 60, 63*—Customs and Inland Revenue Act*, 1878 (*c.* 15), *s.* 12 [PIONEER LAUNDRY AND DRY CLEANERS, LTD. *v.* MINISTER OF NATIONAL REVENUE] .. 254
——, ——, *Income accumulating in Canada in trust for unascertained persons—Charitable institution—Liability for interest on unpaid tax—Income War Tax Act*, (*R.S.C.*, 1927, *c.* 97), *ss.* 4 (*e*), 11 (2), 48, 49, 66*—Statutes of Canada*, 1934 (*c.* 55), *s.* 7 [MINISTER OF NATIONAL REVENUE *v.* TRUSTS AND GUARANTEE CO., LTD.] 149
India—Conflict of laws—Succession—Buddhist—Chinese Buddhist domiciled in Burma—Burma Laws Act (*XIII of* 1898), *s.* 13 [TAN MA SHWE ZIN *v.* KHOO SOO CHONG] 42
——, *Jurisdiction — Appeals from High Court of India—Case involving interpretation of Government of India Act*, 1935, *or order made thereunder—Certificate that case involves such interpretation—Question not considered by High Court—Government of India Act*, 1935 (*c.* 42), *ss.* 205, 293*—Government of India (Adaptation of Indian Laws) Order in Council*, 1937 (*S.R. & O.*, 1937, *No.* 269) [MACKAY *v.* FORBES] .. 368

PAGE

Palestine — Money — Currency — Contract governed by Turkish law—Pension based on salary—Whether payable on gold basis—Unconditional receipts for "net amount payable" — Release [OTTOMAN BANK, HAIFA *v.* CLEMENT MENNI, OTTOMAN BANK, HAIFA *v.* ANIS MANSOUR] 9

West Africa—Succession—Jurisdiction of native tribunal—Native Administration Ordinance, 1928 (*c.* iii) [HAGAN *v.* EFFUAH ADUM, HAGAN *v.* ARABAH TANUAH] 97

Producer, variety programme, heel of dancer's shoe becoming detached and hitting member of audience, whether dancer servant or independent contractor 609

Proof, onus of, breach of statutory duty causing accident to workman 225

——, ——, reasonable steps to avoid interference with flow of water by works executed under statutory powers 157

PUBLIC AUTHORITIES.

Limitation of actions—Alleged negligence of medical officers of county hospital—Action against officers—Whether entitled to protection of Act [NELSON *v.* COOKSON] 30

Statutory powers — Damage to riparian owners — Possibility of alternative method—Onus of proof [PROVENDER MILLERS (WINCHESTER), LTD. *v.* SOUTHAMPTON COUNTY COUNCIL] .. 157

PUBLIC HEALTH.

Dangerous and dilapidated structure—Order to repair or demolish—Works of repair unspecified in order—Whether order defective—Public Health Act, 1936 (*c.* 49), *s.* 58 [R. *v.* BOLTON RECORDER, *Ex parte* MCVITTIE] 236

Streets — Private streets — Erection of walls at boundary of estate—Demolition of walls by local authority—Walls built over sewers—Right of owner to opportunity of being heard before demolition—Officer concerned with demolition—Public Health Act, 1875 (*c.* 55), *s.* 26—*Public Health Act*, 1936 (*c.* 49), *s.* 25—*Private Street Works Act*, 1892 (*c.* [illegible]7), *s.* 19 [URBAN HOUSING CO., LTD. *v.* OXFORD CITY COUNCIL] 211

Rectification, action to enforce award after arbitration 68

Rent, not exceeding £40 per annum, whether rates and taxes included .. 616

——, restriction, decontrol, "house or part of a house let," house not let before 1928, no registration of house as decontrolled 363

Repair, want of, collapse of house on adjoining premises, landlord liable to do repairs, knowledge of landlord 241

Riparian owners, interference with flow of water by works executed under statutory powers, reasonable steps to avoid interference, onus of proof 157

River-wall, repair of, liability for misfeasance, negligent repair 174

ROYAL FORCES.

Army—Applicant convicted of five charges by court-martial—Convictions on four charges quashed by Army Council, but conviction on remaining charge confirmed—Whether Army Council bound to mitigate, remit or commute sentence—Army Act, ss 57 (1), 70 (1), (2)—*Rules of Procedure*, 1926 (*S.R. & O.*, 1926, *No.* 989), *r.* 54 (*A*), (*B*), (*C*) [R. *v.* ARMY COUNCIL, *Ex parte* SANDFORD] 102

Sailor, death from yellow fever and/or malaria, ship sent to mosquito-infested area, whether death due to injury arising out of his employment 558

PAGE

SALE OF GOODS.

Contract—C.i.f. contract—Insurance—Increased premium due to war risk—Goods shipped on ship of belligerent state [OULU OSAKAYETION OF OULU, FINLAND *v.* ARNOLD LAVER & CO., LTD.] 88

Transfer of property—Ascertained goods—Purchase price provided by auctioneers—Bankruptcy of purchaser—Whether property in goods in purchaser or auctioneers—Sale of Goods Act, 1893 (*c.* 71), *s.* 17 (1) [*Re* CAPON, TRUSTEE IN BANKRUPTCY *v.* KNIGHT (R. C.) & SONS. SAME *v.* WOODWARD & WOODWARD] 554

School, conveyance under School Sites Acts, reverter on cesser of use of school, conveyance by owner in fee simple for full value 140

Servant, dancer in variety programme, whether servant or independent contractor, liability of producer of variety programme for injury to member of audience 609

Service, out of jurisdiction, non-disclosure not amounting to an attempt to deceive court 16

Settlement (of claim), motor insurance claim, insured not consulted but liable to pay first £5 of sum paid in settlement, absolute conduct and control of proceedings 204

Sewers, buildings over, walls at boundaries of building estate, when removable by local authority 211

Ship, dangerous locality, sailor's death from yellow fever and/or malaria, whether death due to injury arising out of his employment 558

Shipbuilding yard, vessel under construction, defective staging, occupation of part of a vessel 381

SHIPPING.

Charterparty—Charterparty to remain in force for two consecutive voyages—Deviation in first voyage—Whether charterers bound to make second voyage [*Re* AN ARBITRATION BETWEEN COMPAGNIE PRIMERA DE NAVAGAZIONA DE PANAMA AND COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A., THE YOLANDA] 81

Shoe, dancer, heel becoming detached and hitting member of audience, liability of producer of variety programme, whether dancer servant or independent contractor, standard of care required 609

SOLICITOR.

Alleged unprofessional conduct—Conduct of case left to managing clerk—Inadequate affidavits of documents—False to knowledge of clerk—Whether solicitor can be made personally responsible for costs [MYERS *v.* ELMAN] 484

Solicitor, burden on, costs, poor person, proportion of profit costs 616

Staging, defective, vessel under construction in shipbuilding yard, occupation of part of a vessel 381

Statutory condition, fitness for habitation, rent not exceeding £40 per annum 616

Street, sewers, buildings over sewers, when removable by local authority .. 211

STREET AND AERIAL TRAFFIC.

Licence—Goods vehicle used to carry horse for hire or reward—Whether training of racehorses treated in course of trade or business—Road and Rail Traffic Act, 1933 (*c.* 53), *ss.* 1 (5) (*b*), 9 (1) [NUGENT *v.* PHILLIPS] 57

PAGE

Heavy motor vehicle—Motor vehicle constructed to carry goods—Persons not to drive for continuous period of more than five-and-a-half hours—Driver only actually driving for part of period of employment—Road Traffic Act, 1930 (*c.* 43), *s.* 19 [WELLS & SON, LTD. *v.* SIDERY] 54

Subsidence, meaning of, insurance of premises 113
Subsidiary company, premises compulsorily acquired, right to compensation 116

TELEGRAPHS AND TELEPHONES.

Post-office telephone—Account—Certified account—Whether conclusive evidence of amount owing—Telegraph Act, 1885 (*c.* 58), *s.* 2—*Telephone Regulations*, 1936 (*S.R. & O.*, 1936, *No.* 173), *reg.* 18 (2) [POSTMASTER-GENERAL *v.* WADSWORTH] 1

Tenant, covenant to pay "all rates, taxes and outgoings," owner's drainage rate paid by tenant, whether entitled to be recouped by landlord 312
Third-party risks, policy against, exception, "member of the assured's household" 345
——, ——, false statements, policy subsequently avoided by court, "causing or permitting" an uninsured car to be driven 107
Trade, custom, wages during illness, employee engaged at weekly wage fixed upon hourly basis 538
——, succession, merger of parent and subsidiary companies 541
Transfer, property, ascertained goods, purchase price provided by auctioneers, bankruptcy of purchaser, whether property in goods in purchaser or auctioneers 554
Trial before jury, speeches of counsel, no witnesses called for defence, right of defendants' counsel to invite jury to stop case.. 568
Trustee, deed of arrangement, liability, order given as trustee 406

Ultra vires, resolution to pay in weekly instalments gratuity granted to employee dismissed on ground of ill-health 165

Variety programme, producer, heel of dancer's shoe becoming detached and hitting member of audience, whether dancer servant or independent contractor, standard of care required .. 609
Voidable, policy covering third-party risks, misrepresentation 107
Volenti non fit injuria, watchman returning to burning premises 26

Wages, illness, implied term in contract of employment 281, 538
——, ——, ——, employee engaged at weekly wage fixed upon hourly basis, trade custom 538
War, cause of inability to pay, onus of proof, emergency legislation 460
——, possibility of death, assessment of damages under Lord Campbell's Act 85
War risks, c.i.f. contract, right to seller to ship on belligerent ship 88
Water, flow of, interference with, works executed under statutory powers, reasonable steps to avoid interference, onus of proof 157

PAGE

WATERS AND WATERCOURSES.

Riparian owners—Interference with flow of water by works executed under statutory powers—Reasonable steps to avoid interference—Onus of proof [PROVENDER MILLERS (WINCHESTER), LTD. *v.* SOUTHAMPTON COUNTY COUNCIL] 157

Widowhood, gift during, decree of nullity in respect of second marriage, whether gift restored 260

WILLS.

Construction—Gift during widowhood—Decree of nullity in respect of second marriage—Whether gift restored [*Re* EAVES, EAVES *v.* EAVES] 260
Legacy—Forfeiture clause—Life interest forfeited—Interest of issue—Severability of forfeiture clause—Rule against perpetuities [*Re* MORRISON'S WILL TRUST, WALSINGHAM *v.* BLATHWAYT] 332

WORK AND LABOUR.

National health insurance—Employment—Bailee of motor car used for plying for hire—Whether in employment of bailor—National Health Insurance Act, 1936 (*c.* 32), *s.* 161, *Sched. I, Part I, cl.* (*e*) [APPEAL OF THOMPSON, *Re* A. JOHNSON (HOVE), LTD.] 277
——, ——, *Remuneration in excess of* £250 *per annum—Unpaid assistance of employee's wife—Whether value of such assistance may be deducted from remuneration—National Health Insurance Act*, 1936 (*c.* 32), *s.* 161, *Sched. I, Part II, cl.* (*k*) [APPEAL OF SHERWOOD, *Re* G. F. & A. BROWN & SONS, LTD.] 291
——, ——, *Sub-postmaster—Remuneration by scale payment—National Health Insurance Act*, 1936 (*c.* 32), *Sched.* I [APPEAL OF ROBERTS, *Re* POSTMASTER-GENERAL] 269

WORKMEN'S COMPENSATION.

Alternative remedies—Election—Receipt of compensation—Knowledge of workman—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 29 [SELWOOD *v.* TOWNELEY COAL AND FIRECLAY CO., LTD.] .. 34
——, ——, ——, *Whether contract was for infant's benefit—Workmen's Compensation Act*, 1925 (*c.* 84), *s.* 29 [STIMSON *v.* STANDARD TELEPHONES & CABLES, LTD.] 225
Insolvency of employer—Liability of insurers to workman—Mutual indemnity society—Non-payment of calls—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 7 [WOODING *v.* MONMOUTHSHIRE AND SOUTH WALES MUTUAL INDEMNITY SOCIETY, LTD. JAMES *v.* SAME. HAWKINS *v.* SAME].. 570
Sailor—Ship sent to mosquito-infested area—Death from yellow fever and/or malaria—Dangerous locality—Whether death due to injury arising out of his employment—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (1) [DOVER NAVIGATION CO., LTD. *v.* CRAIG] 568

CORRIGENDA.

P. 203. TOOKE *v.* BENNETT & CO. At end of case substitute for "Judgment for plaintiff" the words: "After other points had been dealt with, an order for an account was made."

P. 339. HAILE *v.* WEST. In the first line of the **HELD** at F.3, for "costs" read "amounts" and make the same correction at p. 341, F.4—"aggregate these amounts" in place of "aggregate these costs."

P. 370. COCKWELL *v.* ROMFORD SANITARY STEAM LAUNDRY, LTD. In the headnote at H read "and of all rent reserved up to such expiration, to convey . . ." substituting "expiration" for "completion."

STATUTES, ETC., REFERRED TO

	PAGES
Charitable Uses Act, 1735 (*c.* 36)	140
Fires Prevention (Metropolis) Act, 1774 (*c.* 78), *s.* 83	601
School Sites Act, 1841 (*c.* 38), *s.* 2	140
Copyright Act, 1842 (*c.* 45)	192
School Sites Act, 1844 (*c.* 37), *s.* 3	140
Lands Clauses Consolidation Act, 1845 (*c.* 18), *s.* 121	116
School Sites Act, 1849 (*c.* 49), *s.* 4	140
Public Parks, Schools and Museums Act, 1871 (*c.* 13), *ss.* 3, 4	140
Building Societies Act, 1874 (*c.* 42), *s.* 13	427
Public Health Act, 1875 (*c.* 55), *s.* 26	211
Customs and Inland Revenue Act, 1878 (*c.* 15), *s.* 12	254
Copyright (Musical Compositions) Act, 1882 (*c.* 40)	192
Bills of Exchange Act, 1882 (*c.* 61), *s.* 29 (1)	351
Telegraph Act, 1885 (*c.* 58), *s.* 2	1
Private Street Works Act, 1892 (*c.* 57), *s.* 19	211
Public Authorities Protection Act, 1893 (*c.* 61), *s.* 1	43
Sale of Goods Act, 1893 (*c.* 71), *s.* 17 (1)	554
Factory and Workshop Act, 1901 (*c.* 22), *s.* 10	225
——, *ss.* 79, 82, 104, 140, 141, 142, 149, 151	381
Copyright Act, 1911 (*c.* 46)	192
Bankruptcy Act, 1914 (*c.* 59), *s.* 56 (1)	59
Income Tax Act, 1918 (*c.* 40), Sched. D, Cases I & II, r. 11	541
Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 12 (2)	363
Finance Act, 1920 (*c.* 18), *s.* 21	186
Government of Ireland Act, 1920 (*c.* 67), *s.* 49 (*a*) (*b*)	464
Rent and Mortgage Interest Restrictions Act, 1923 (*c.* 32), *s.* 2 (1)	363
Land Registration Act, 1925 (*c.* 21), *s.* 20	457
Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 198	529
Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (1)	558
——, *s.* 7	570
——, *s.* 29	34, 225
Finance Act, 1926 (*c.* 22), *s.* 32 (2)	541
Moneylenders Act, 1927 (*c.* 21), *s.* 6	200
Road Traffic Act, 1930 (*c.* 43), *s.* 19	54
——, *s.* 35 (1)	107
Land Drainage Act, 1930 (*c.* 44), *s.* 34	174
Road and Rail Traffic Act, 1933 (*c.* 53), *ss.* 1 (5) (*b*), 9 (1)	57
County Courts Act, 1934 (*c.* 53), *s.* 73	339
Betting and Lotteries Act, 1934 (*c.* 58), *s.* 3 (2)	76
Government of India Act, 1935 (*c.* 42), *ss.* 205, 293	368
National Health Insurance Act, 1936 (*c.* 32), *s.* 161	277, 291
——, Sched. I	269, 277, 291
——, Part I, cl. (*e*)	277
——, Part II, cl. (*k*)	291
Public Health Act, 1936 (*c.* 49), *s.* 25	211
——, *s.* 58	236
Housing Act, 1936 (*c.* 51), *s.* 2	616
Matrimonial Causes Act, 1937 (*c.* 57), *s.* 2	73, 533
Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (*c.* 26), *s.* 4	363
Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1	169
——, *s.* 1 (1), (2) (*a*)	337
——, *s.* 1 (2) (*b*), (4)	460
Army Act, *ss.* 57 (1), 70 (1), (2)	102
Poplar Borough Council Superannuation and Pensions Act, 1911 (*c.* cii), *s.* 8 (2)	165
Intoxicating Liquor Act (Northern Ireland), 1923 (*c.* 12), *s.* 9 (*c*)	464
Intoxicating Liquor and Licensing Act (Northern Ireland), 1927 (*c.* 21), *s.* 3 (6) (iv)	464
Burma Laws Act (xiii of 1898), *s.* 13	43
Canadian Copyright Act, 1921 (R.S.C., 1927, *c.* 32)	192
Income War Tax Act (R.S.C., 1927, *c.* 97), *s.* 3	254
——, *s.* 4 (*e*)	149
——, *s.* 5 (*a*), (*b*)	254
——, *s.* 11 (2)	149
——, *s.* 48	149
——, *s.* 49	149
——, *s.* 58	254
——, *s.* 60	254
——, *s.* 63	254
——, *s.* 66	149
Canadian Copyright Amendment Act, 1931 (*c.* 8), *ss.* 2 (*v*), 3	192
Statutes of Canada, 1934 (*c.* 55), *s.* 7	149

PAGES
R.S.C., Ord. 11, r. 1 (*g*) .. 16
——, Ord. 16, r. 31B .. 616
——, Ord. 22, r. 3 .. 39
Rules of Procedure, 1926 (S.R. & O., 1926, No. 989), r. 54 (A), (B), (C) .. 102
Shipbuilding Regulations, 1931 (S.R. & O., 1931, No. 133), regs. 11, 13 .. 381
Telephone Regulations, 1936 (S.R. & O., 1936, No. 173), reg. 18 (2) .. 1
Government of India (Adaptation of Indian Laws) Order in Council, 1937 (S.R. & O., 1937, No. 269) .. 368
Courts (Emergency Powers) Rules, 1939 (S.R. & O., 1939, No. 995), rr. 2, 4 .. 337

WORDS AND PHRASES

PAGE
All losses .. 358
All rates, taxes and outgoings .. 312
Appropriate court .. 337
House or a part of a house let .. 363
Member of the assured's household .. 345

Printed by Thomas De La Rue & Co., Limited, 110, Bunhill Row, London, E.C.1.

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

HIS MAJESTY'S POSTMASTER-GENERAL *v.* WADSWORTH.

[COURT OF APPEAL (Slesser and Luxmoore, L.JJ., and Macnaghten, J.), **October 4, 1939.**]

Telegraphs and Telephones—Post-office telephone—Account—Certified account—Whether conclusive evidence of amount owing—Telegraph Act, 1885 (*c.* 58), *s.* 2—*Telephone Regulations,* 1936 (*S.R. & O.,* 1936, *No.* 173), *reg.* 18 (2).

The appellant was a telephone subscriber against whom the Postmaster-General brought the present action claiming 6*s.* 4*d.* in respect of telephone service. The only evidence on behalf of the Postmaster-General was a duly certified account, and he relied upon the Telephone Regulations, 1936, reg. 18 (2). The appellant contended that this regulation was *ultra vires* :—

HELD : the regulation was *intra vires* and the certified account was conclusive evidence of the amount due.

[**EDITORIAL NOTE.** Acting under his statutory powers, the Postmaster-General has made an order that a certified account should be conclusive upon the telephone subscriber as to the amount due from him for telephone service. It is held that not only is the order *intra vires,* but that, the contract for the service being subject to the rules, the subscriber was bound by those rules in any event.

AS TO TELEPHONES, see HALSBURY, Hailsham Edn., Vol. 32, pp. 30, 31, para. 38 ; and FOR CASES, see DIGEST, Vol. 42, pp. 890, 891, Nos. 30, 31.]

APPEAL by the defendant from a decision of His Honour JUDGE A. R. THOMAS, given at the Mayor's and City of London Court on Mar. 2, 1939 (and reported [1939] L.J.N.C.C.R. 180), whereby he dismissed an appeal by the defendant against a decision of the registrar ordering him to pay the plaintiff 6*s.* 4*d.* in respect of a telephone account.

N. Ker Lindsay for the appellant.

J. P. Ashworth for the respondent.

Lindsay : The Telephone Regulations, 1936, reg. 18 (2) is *ultra vires* because the statute gives the Postmaster-General no power to make so wide a rule. The Telegraph Act, 1899, was a beneficial statute and no order properly made under it can have the effect of depriving a subject of his right of disputing an account in the courts.

Ashworth was not called on.

Slesser, L.J. : In this case the Postmaster-General brought an action against the appellant for the payment of 6*s.* 4*d.* alleged to be due to the Postmaster-General in respect of telephone service. On Dec. 7, 1937, the appellant entered into an agreement with the Postmaster-General for the provision of a telephone service at a specific address and the agreement contained these words :

> Subject to the Statutory Telephone Regulations from time to time in force and to my payment in advance of the appropriate connection or transfer charge.

The quarterly rental was then set out. The agreement was duly signed, and the telephone was duly provided. The Postmaster-General submitted to the appellant an account, and a certified account was before the registrar and the judge in the court below, and it is not disputed by the appellant that that account was properly certified. That account states on the credit side that there is a balance due to the Postmaster-General of 6*s.* 4*d.*, and that is the sum which the appellant refuses to pay, on the ground that he has not used the telephone in such a way as to give the Postmaster-General authority to charge that 6*s.* 4*d.*

In the first place it is necessary to consider the regulations under which the Postmaster-General purports to rely upon the certified account. The regulation in question is No. 18, cl. 2, of the regulations called : The Telephone Regulations, 1936, which are made under the authority of the Telegraph Acts, 1863 to 1878, and particularly the Act of 1885 which amends those Acts.

The power to make regulations here relevant is contained in sect. 2 of the Act of 1885, which is as follows :

> The Telegraph Act, 1868, s. 15, shall be repealed, and in place thereof be it enacted as follows : The Postmaster-General, with the consent of the Commissioners of Her Majesty's Treasury, may from time to time make regulations for determining the hours during which the offices appointed by him to be places for the receipt and despatch of telegrams shall be open for the transaction of telegraphic business, and for fixing the sums to be from time to time paid on account of the transmission of telegrams . . .

That is the fixing of scales. It may be mentioned that it is not disputed that it has been in fact decided that where the word " telegram " is here used, the word " telephone " may be substituted. Then there follow these material words :

> and on account of services rendered in connection therewith, and on account of the use of any telegraphs by any persons, and for determining the conditions and purposes on which and for which such use may be permitted, and for the general conduct of telegraphic business.

It is said on behalf of the Postmaster-General that the words : " regulations for determining the conditions and purposes on which and for which such use "—that is the use of the telephone—" may be permitted " are apt words to include regulation No. 18 (which, as I have said, is the regulation here relied upon) clause 2, and equally I think it must be said, clause 1. Clause 1 says this :

> Except with the sanction of the Postmaster-General all fees and charges payable under these regulations shall be prepaid ;

and I have no difficulty at all in coming to the conclusion that such a condition, namely, that the use may be permitted only in the circumstances that, except with the sanction of the Postmaster-General, all fees and charges shall be prepaid, is precisely within the powers given by sect. 2 in the words that the Postmaster-General may make regulations for determining the conditions upon which such use may be permitted. It may be observed that the legislature in sect. 2 of the Act of 1885, uses the phrase " conditions and purposes," thus making it clear that the purpose is one thing and the condition is another thing, and " conditions," I think, therefore, must be taken to extend beyond " purposes " in that connection. That being so, I am equally of opinion that clause 2, which provides that :

> In any proceedings by or against the Postmaster-General in relation to any sum payable under an agreement or under these regulations the production of a certified account of such sum shall be conclusive evidence of the amount thereof and that liability for the payment of the subscription and charges specified therein has been incurred

is equally a condition upon which the use of the telephone may be permitted. The regulations themselves are to be made in accordance with the earlier Act of 1868, which provides that they shall be laid before Parliament in the way which is familiar, and they seem to me to be entirely *intra vires*, and to apply to this particular case.

There is, however, another way in which the case may be put, which, I think, defeats this appeal. The agreement itself states that the telephone shall be provided " subject to the Statutory Telephone Regulations from time to time in force." Now, it has been argued by counsel for the appellant that this regulation is not a statutory regulation, because it is *ultra vires* the Act of Parliament. I have already explained why in my opinion that argument is fallacious. Having once come to the conclusion that the regulation is *intra vires*, it is a statutory regulation. Therefore, by reason of this specific contract, the appellant has agreed that he will receive the telephone service on the basis that the language of reg. No. 18 (2) shall apply, and that the production of a certified account shall be conclusive evidence of the amount thereof. Speaking for myself, more particularly as the judgment seems to have proceeded primarily upon that point, I am of opinion that, had he not included these words in the contract, he nevertheless would have been entitled to rely upon a valid regulation and to say : " The legislature, by permitting this regulation, has said that the Postmaster-General may rely on reg. 18 (2)." So that in my view, however the language of the contract might be against the Postmaster-General, in the sense that it might be drawn without those specific words there inserted, the force of the regulation is sufficient in itself, apart from the contract, to prevent the appellant from challenging the account. That question does not arise in the present case, because in fact he has in terms in his own agreement agreed to be bound by this provision, no doubt a salutary and useful provision for him, because otherwise it might be that the

Postmaster-General would have required prepayment before he accepted the telephone calls.

For those reasons I am of opinion that this appeal fails and must be dismissed with costs.

Luxmoore, L.J.: I agree, and I do not desire to add anything.

Macnaghten, J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Alfred Slater & Co.* (for the appellant); *The Solicitor, Post Office* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

DAVIS *v.* FOOTS AND ANOTHER.

[Court of Appeal (MacKinnon and du Parcq, L.JJ., and Bennett, J.), **October 5, 6, 1939.**]

Landlord and Tenant—Fitness of premises—Escape of gas—Removal of gas-fire—Fitting not required by tenant removed by landlord and previous occupier—Whether contract to remove.

The appellants let an unfurnished flat to the respondent's husband. After agreeing to take the premises the respondent or her husband stated that they did not require a gas-fire which was installed in one of the rooms. The appellants, who had been in occupation of the flat, thereupon stated that it would be taken away and it was removed by a son of the appellants, who, in doing so, removed the tap and failed to stop the pipe. At the time of such removal the gas was turned off at the main, but, upon the respondent and her husband moving in, it was turned on at their request by an employee of the gas company. The respondent and her husband slept in the room where the gas-fire had been and were rendered unconscious by gas poisoning, the respondent's husband dying as a result of such poisoning:—

Held: (i) the appellants, as the landlords of the flat, were not liable in tort for damage caused by the defective gas supply.

(ii) the facts did not amount to a contract to remove the gas-fire and no claim could be made for breach of contract.

[EDITORIAL NOTE. It is well-established that there is no liability in tort in the circumstances of this case, and the real issue is whether there was a liability in contract. The Court of Appeal, on this point, have reversed the judge's decision and have held that no contract was proved.

As to Fitness of Premises, see HALSBURY, Hailsham Edn., Vol. 20, pp. 202-204, paras. 220-222; and for Cases, see DIGEST, Vol. 31, pp. 176-181, Nos. 3080-3160.]

Cases referred to:

(1) *Bottomley* v. *Bannister*, [1932] 1 K.B. 458; Digest Supp.; 101 L.J.K.B. 46; 146 L.T. 68.

(2) *Wilkinson* v. *Coverdale* (1793), 1 Esp. 74; 12 Digest 223, *1849*.

(3) *M'Alister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.

(4) *Otto* v. *Bolton & Norris*, [1936] 2 K.B. 46; [1936] 1 All E.R. 960; Digest Supp.; 105 L.J.K.B. 602; 154 L.T. 717.

APPEAL by the defendants from a judgment dated Mar. 4, 1939, of WROTTESLEY, J., sitting at Newcastle-upon-Tyne. The facts are fully set out in their Lordships' judgments.

J. Charlesworth for the appellants.

Cyril Salmon for the respondent.

A *Charlesworth:* There was no duty on the landlord to see the gas fittings were in order. He owes no duty to the tenant: *Bottomley* v. *Bannister* (1). [Counsel referred to SALMOND ON TORTS, 9th Edn., pp. 538, 541.] The judge was wrong in drawing an inference of fact that there was an express contract to remove the gas-fire. It belonged to B the landlord and was removed in the ordinary course when the tenant said he did not want it. That was before the tenant took possession of the flat.

Salmon: The agreement for the letting was complete before the gas-fire was removed. The judge held as a fact that there was an undertaking to remove the stove. I rely on *Wilkinson* v. *Coverdale* (2). Up C to the time the contract was made, the premises were perfectly safe. None of the cases which have been cited deal with a defect which happened after the making of the contract as was the position here. In *Bottomley* v. *Bannister* (1) the court was not dealing with a case of misfeasance. It is clear from the judgment of GREER, L.J., that the important D moment is the date the contract is complete.

MACKINNON, L.J.: The plaintiff, now a widow, in August last year was about to be married. She and her intended husband approached the defendants, who were then the owners and occupiers of a flat in E Seaham Harbour. The defendants were proposing to leave those premises, and were willing to let them to the plaintiff and her husband. It was agreed between the plaintiff, the husband, and the defendants that the former should become tenants of the Foots at 13*s*. per week as from Saturday, Sept. 4. On Aug. 26 the furniture of the defendants F was being moved out from the flat by young Foots, the son of the defendants, who was a ship's carpenter. Among the furniture and other chattels belonging to the defendants, young Foots removed from its fixture in a grate a gas-fire, which was the property of the defendants. At that time the gas was turned off at the meter. Young Foots G unscrewed the connection between the gas-fire and the pipe, which, when the gas was turned on, led the gas to the fire, and also removed the fireplace as a fireplace along with other chattels of the defendants.

The judge has found (and we accept his finding) that when young Foots so removed the gas-fire, he did not leave on the pipe which he H disconnected any tap which could be turned off. The result was that, after the belongings of the defendants were removed from the house, there was the potential danger that if anybody came there and turned on the gas, without going to see that the various places to which the pipes went had their taps turned off, or had taps which were turned off, there would and could be an escape of gas.

On Sept. 4 the marriage of the plaintiff and her husband took place, and they went into occupation of the flat that they had taken from the defendants. They apparently arrived there late at night, and they went to bed in the room from which the gas-fire had been removed on Aug. 26 by young Foots. On Sept. 4, in the morning at 11 o'clock, the husband, just before going to his wedding, brought in the gas company's representative, who turned on the gas at the meter. Upon the facts as found by the judge (which we accept), gas must have been escaping from this disconnected pipe in this room ever since 11 o'clock in the morning. So one would suppose that when they went there to go to bed late at night, there would have been an appalling smell of gas. The plaintiff says there was a smell in the room, but she thought it was due to their new furniture and linoleum. She herself had not had previous experience of gas, and did not recognise the smell. Unhappily they did go to bed in ignorance of the fact that the gas must have been pouring into the room. The result of it was that they became unconscious. They stayed there all through Sunday. It was only when some of their relations came on the Monday morning and broke into the flat that they were found unconscious. The husband died of gas poisoning. The plaintiff was very severely ill as a result, being three weeks in hospital.

As a result of this disaster the plaintiff brings this action against the defendants, alleging that they are liable to her for compensation by way of damages to her in respect of the loss of her husband. The judge has found in her favour, and awarded her £350 damages.

I have omitted one fact, which I shall mention in a moment: but, upon the facts as I have stated them, I think there can be no doubt that in law the defendants are not liable to the plaintiff. The law is stated by SCRUTTON, L.J., in *Bottomley* v. *Bannister* (1), at p. 468, in a single sentence, which is all that I need cite:

> Now it is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant . . . for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself, or is aware of their existence.

In other words the defendants, the landlords, let this house to the plaintiff. They let it, I will assume, with a pipe from which gas could escape when gas was turned on. That, of course, might be said to be a dangerous defect: but that being the principle which has been recognised over and over again, the defendants are not liable for that. It is the tenant's business, when he takes possession of a house, to discover and remedy any danger that exists. In this case, quite obviously, it did not need the exercise of a great deal of care for somebody, who was turning on the gas in a house where it had been turned off for some time, to go round and see that the various pipes into which the gas would be admitted were safe, and were not leaking. Therefore, upon those facts, that the son of the defendant did remove this gas-fire, and left the end of the pipe without a tap turning off the possible entry of gas, I think that the defendants are not liable for the resultant disaster.

But there is one further fact which I should mention. Before Aug. 26, the day on which young Foots removed this gas-fire, along with other pieces of furniture, there was a simple conversation between the first defendant, Mrs. Foots, and the plaintiff. Mrs. Foots said, on going round the house with her: "Here is this gas-fire." It was a chattel belonging to Mrs. Foots. She asked the plaintiff if she and her husband would like to have it and make use of it. No doubt if the plaintiff had said: "Yes, they would," Mrs. Foots would have followed it up with an inquiry as to how much they would pay for it, or whether they would pay something in addition to the rent, or something of that sort: but no such further bargaining took place, because the plaintiff said they would not require it and did not want it. Conversation then happened; and this is the only evidence with regard to it. This is a question which comes in the evidence of the plaintiff:

> Did Mrs. Foots say anything when you said you did not want it? (A) She said she would have it taken out.

Upon that simple piece of conversation there has been rested a contention, which has been accepted by the judge, that there was an undertaking by the defendants to do that work for the plaintiff; and that there was implied in that undertaking that they would do that work with reasonable care and skill. I do not think that there was any undertaking to do work for the plaintiff; and there was no undertaking to use reasonable care and skill in doing any work for the plaintiff. It was not doing any work for the plaintiff at all. The plaintiff had no interest, right or property in the gas-fire: it was a chattel belonging to the defendants. The remark of Mrs. Foots: "Well, then I will have it taken out," was merely a statement that, if Mrs. Davis did not require this article, and, therefore, was not prepared to bargain as to terms, she should retain its possession. It was merely a statement by Mrs. Foots: "Very well, then I will take away my chattel." There was no undertaking to do any work, or do anything for the plaintiff in regard to any article in which the plaintiff had any interest or property at all. In those circumstances, I am unable to see that I can extract from that very simple conversation any contractual obligation by these defendants to exercise any care and skill with regard to the gas-fire, the breach of which undertaking would place any liability for its consequences upon the defendants to the plaintiff.

In the result, I think that the plaintiff has no cause of action, in respect of this very lamentable disaster, against the defendants; and that the judgment of the judge was wrong in awarding her damages. This appeal should be allowed, and judgment entered for the defendants.

DU PARCQ, L.J.: I have come to the same conclusion. The case as pleaded is not based on the undertaking or agreement on which the

judge has founded his decision; but speaking for myself, if I had thought
that the judge's decision could be supported on that ground, I should
have felt no difficulty in saying that the pleadings ought to be amended
in order to enable us to give effect to the judge's decision. I think,
however—and I have very little to add to what has been said—that it
is impossible on that ground, or on any ground, to support the decision A
to which the judge came.

The facts give rise to some difficulty. Undoubtedly some support is
to be found for the learned judge's decision in a statement of his view
of the law by Sir John Salmond in his work on "Torts": but I cannot
find any authority binding on this court to support the judge's view. B
On the contrary, the authorities seem to me to be against it.

It is beyond question that the relationship of landlord and tenant
did not impose any liability on the landlord here. If a landlord lets
premises in a dangerous condition, and that is the only fact to be relied
upon, without more no liability rests upon the landlord for the consequences C
of that dangerous condition. I cannot find here any express
contract to leave the premises in a safe condition. All that happened
was that on some date before Aug. 26, which is not specified, the landlady
said that, as the tenant would not require the gas-fire which was
in the bedroom, she would remove it before the tenancy began. She D
would be bound to remove it in any case for her own purposes, and she
was not undertaking to do any more than that which a contract of letting
would impose upon her, that is, let the premises as they stood without
the gas-fire to the tenant. As has been said already by my Lord, it
is impossible to found any claim. On the authority of *Wilkinson* v. E
Coverdale (2), a case which I think has long been regarded as quite
accurately stating the law, if somebody chooses to undertake an obligation,
even gratuitously, to do a service to another person, and does it
negligently, he may well render himself liable. But here—I do not
repeat the reasons which have been given—there is no question of doing F
a service for the plaintiff or her husband at all.

The only remaining question is whether there is some liability in
tort, and whether one can apply to this case the wide principle stated
in *M'Alister* (*or Donoghue*) v. *Stevenson* (3). As to that, I would only
say this. I think some assistance is to be derived from the careful G
judgment of ATKINSON, J., in *Otto* v. *Bolton & Norris* (4). I think there
may be other reasons why it is impossible to apply here the principle,
as I have called it shortly, in *M'Alister* (*or Donoghue*) v. *Stevenson* (3),
but one conclusive reason against applying it to such a case as this is
to be found, I think, in that judgment in *Otto* v. *Bolton & Norris* (4). H
I will only read a part of the head-note for the purpose of showing what
I mean:

> The principle laid down in *Donoghue's* case (3) is that there can be no duty cast upon the vendor, without proximate relationship, of which the main test is whether there is reasonable opportunity for examination between the time of the sale or the doing of the work and the use or consumption of the article by the purchaser.

Making the necessary changes in that sentence, one would ask here whether there was a reasonable opportunity for examination between the time when the work was done and the time when the premises were used and the gas turned on. It is at once apparent that there was ample opportunity. The fire was removed by Foots on Aug. 26. The
A keys were handed to the plaintiff or her husband on Aug. 28, although the landlady still retained one key, because she had some furniture which she wished to remove. On Aug. 30, the tenants went in and looked round the premises, although they did not immediately occupy them. This was not a latent defect. It was quite apparent on any examination,
B and one would think only too plainly apparent, as soon as the gas was turned on. One would have said it was inevitable that it should have been noticed. I therefore cannot find any ground on which the judgment of the judge can be supported, and I agree that this appeal should be allowed.

C

BENNETT, J.: I also agree. The only ground upon which the judge decided the case in favour of the plaintiff was the undertaking which one of the defendants, Mrs. Foots, is said to have given to the plaintiff. My Lord has already referred to the question and answer of
D the plaintiff, which is the foundation of the judge's conclusion that Mrs. Foots did give an undertaking to the plaintiff. But for myself, I am unable to see or infer from the question and the answer any undertaking of any kind given by Mrs. Foots to the plaintiff. For these reasons, it seems to me that the foundation for the judge's judgment
E disappears, and, accordingly, I agree with my Lord and with DU PARCQ, L.J., that the appeal must be allowed and judgment entered for the defendants.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Maples, Teesdale & Co.*, agents for *Wright & Ellis*, Seaham
F (for the appellants); *Isadore Goldman & Son*, agents for *Lionel Wolfe & Hewitt*, Sunderland (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

G

THE OTTOMAN BANK, HAIFA v. CLEMENT MENNI
THE OTTOMAN BANK, HAIFA v. ANIS MANSOUR

[PRIVY COUNCIL (Lord Thankerton, Lord Fairfield, Sir Lancelot Sanderson), **June 27, 29, 30, July 21, 1939.**]

H *Privy Council—Palestine—Money—Currency—Contract governed by Turkish law—Pension based on salary—Whether payable on a gold basis—Unconditional receipts for "net amount payable"—Release.*

The respondent Menni entered the service of the appellant banking corporation in 1910, at Haifa, and in 1913 he became a member of the permanent staff there, and he signed a declaration of adherence to the pension regulations of the Bank, known as the "Caisse de pensions et de retraites," the provisions of which were to form an integral part of the conditions of his engagement and their application of which was to be obligatory to him. He retired from the service of the Bank in 1933, when he admittedly became entitled to a pension. The respondent Mansour became a member of the permanent staff of the Bank in 1912 and signed a declaration of adherence to the pension regulations similar to that signed by the respondent Menni. He retired in 1933 and was placed on pension as from Jan. 1, 1934. Both respondents claimed that, on a proper construction of the contract, their salary was payable A in gold Turkish pounds only, and that their pensions were to be calculated accordingly. Prior to the British occupation of Palestine, the currency was the Turkish currency, and from May, 1916, onwards the appellant paid the salaries of the respondents and its other employees in Turkish currency notes. After the British occupation, from January, 1919, until May, 1933, the "fixed-rate period," the salaries were still B expressed as sums of Turkish money, but were paid in the local currency at a fixed rate of exchange. A new currency was introduced into Palestine in November, 1927, and from May, 1933, onwards, the "Palestinian period," the salaries were expressed as the sums of Palestinian money actually paid to the employees. It was established by the evidence that (i) although the Turkish gold pound was current at the date of the contract, the proper construction of the contract according to Ottoman C law was that the pound Turkish referred to in the contract was a unit of account and not a contract to pay Turkish gold pounds in the absence of an express provision to that effect, (ii) at all material times since 1914 the paper pound Turkish had been legal tender and the Turkish gold pound had disappeared from circulation, (iii) the practice of the bank of converting the amount of the employees' salary at a fixed rate of conversion did not, in Turkish law, amount to an admission D that the salary was payable on a gold basis, as the fixed rate was not based on the bullion content of the Turkish pound. The respondent Menni, in Dec., 1932, on the pay sheet where the calculation of his salary was fully stated, had signed a receipt for the "net amount payable." The calculation of that amount was inconsistent with his present claim :— E

Held : (i) following the decision in *Ottoman Bank of Nicosia* v. *Chakarian* (1), the contract was not one to pay the salary on a gold basis, but a contract to pay in whatever might be legal tender according to Turkish law at the material time.

(ii) the unconditional receipts given by the respondent Menni were an admission that he had received the correct amount due to him and, therefore, amounted to a release by which his claim was extinguished. F

[EDITORIAL NOTE. In the main the decision here follows that in *Ottoman Bank of Nicosia* v. *Chakarian* (1). The matter is, however, carried a stage further in the consideration of the effect of the giving by the employee of an unconditional receipt for the "net amount due."

As to Release, see HALSBURY, Hailsham Edn., Vol. 7, pp. 250-254, paras. G 344-350 ; and for Cases, see DIGEST, Vol. 12, pp. 497-515, Nos. 4064-4272.]

Cases referred to :

(1) *Ottoman Bank of Nicosia* v. *Chakarian*, [1938] A.C. 260 ; [1937] 4 All E.R. 570 ; Digest Supp. ; 107 L.J.P.C. 15 ; 158 L.T. 1.

(2) *Ottoman Bank of Nicosia* v. *Dascalopoulos*, [1934] A.C. 354 ; Digest Supp. ; H 103 L.J.P.C. 73 ; 151 L.T. 151.

(3) *Ottoman Bank* v. *Chakarian*, [1930] A.C. 277 ; Digest Supp. ; 99 L.J.P.C. 97.

Consolidated Appeals from two judgments of the Supreme Court of Palestine sitting as a Court of Appeal [Manning and Copland, JJ.], dated Feb. 19, 1937, reversing two judgments of the District Court of

Haifa [Sherwell, P., and Hubbard, J.], dated Feb. 5, 1936 and Apr. 16, 1936, respectively. By the judgment of the Supreme Court it was decided in substance that the former salaries and present pensions of the respondents were and are payable on a gold basis.

The judgment of their Lordships was delivered by Lord A Thankerton.

Colin H. Pearson and *I. W. G. Barry* for the appellant banking corporation.

The respondents were not represented and the appeal was heard *ex parte*.

B *Pearson :* The present cases are indistinguishable in principle from *Ottoman Bank* v. *Chakarian* (1) and are distinguishable on many grounds from *Ottoman Bank* v. *Dascalopoulos* (2). At all times the respondents' salaries under their contracts of service were expressed in money and payable in currency and not in gold or in terms of gold. The evidence C goes to show that by Turkish law the Turkish pounds referred to in the Pension Regulations and the Pay Sheets were Turkish units of account payable in any form of currency which might be authorised as legal tender by the law of Turkey from time to time. During the "Turkish period" the salaries of the respondents were in all respects sums of D Turkish money which could lawfully be paid in Turkish currency notes at their face value. During the "fixed rate period" beginning about the end of the year 1918 and ending in May, 1933, the appellant paid, and the respondents accepted payment of, their salaries in the currency of Palestine at the fixed rate, without regard to the varying relations of E Turkish currency and the currency of Palestine to each other, or of the varying relation of either of them to gold. Under the provisions of the Mejelleh the signatures of both respondents to the Pay Sheets and the separate receipts given by the respondent Menni, constitute binding and conclusive admissions whereby they are precluded from claiming payment F either of their salaries or of their pensions on a gold basis. Under the provisions of the Mejelleh a new contract formed by offer and acceptance of the fixed sums in the currency of Palestine, arrived at by applying the fixed rate to the salaries expressed as sums of Turkish money, would supersede any supposed previous contract for payment on a gold basis. G [Counsel referred to : *Ottoman Bank* v. *Chakarian* (1), *Ottoman Bank* v. *Chakarian* (3), *Ottoman Bank* v. *Dascalopoulos* (2).

Lord Thankerton : The appellant, originally established in 1863 as the Imperial Ottoman Bank, with its head office in Constantinople, H now Istanbul, has many branches, most of which, including the Haifa branch, were formerly within the Turkish Empire. It had also branches outside the Empire, and the branch bank in Cyprus, which was formerly under lease to Great Britain, is carried on under the name of the Ottoman Bank of Nicosia.

The respondent Menni entered the service of the appellant in 1910 at

Haifa, and he became a member of the permanent staff there on June 16, 1913, when he signed a declaration of adherence to the pension regulations of the Bank, known as the "Caisse de pensions et de retraites," the whole provision of which was to form an integral part of the conditions of his engagement and the application of which was to be obligatory for him. He retired from the service of the bank on Nov. 30, 1933, under notice of termination of his employment, when he admittedly became entitled to a pension.

The respondent Mansour entered the service of the Bank in June, 1912, at Haifa, and became a member of the permanent staff on Dec. 12, 1912, when he signed a declaration of adherence to the pension regulations similar to that signed by the respondent Menni. He remained in the service of the bank at Haifa until Dec. 31, 1933, when he retired under notice from the bank, and was placed on pension as from Jan. 1, 1934.

The amount of pension is provided for by the following articles of the pension regulations:

> Article 14.—The amount of the pension is calculated on the basis of the salary the employee was drawing on Dec. 31 of the year which preceded that in which he was put on pension.
>
> Article 15.—The amount of the pension will be calculated on the following basis: (1) For ten completed years of service, 30 per cent. of the fixed annual salary. (2) 2 per cent. for each succeeding year.
>
> Article 16.—In no case must the pension exceed three-quarters of the fixed annual salary. In no cases shall the pension be less than Ltq. 45 per year in the case of the clerical staff, and Ltq. 25 per year in the case of the subordinate staff.

It may now be taken as beyond dispute that, like the salary, the pension falls to be calculated in Turkish pounds, and that the fixed annual salary on the material date alone forms the basis; a claim by the respondent Menni that certain additional allowances should also be taken into account in calculation of the pension was rejected by both Courts below, and he has accepted the decision. But both respondents claim that, on a proper construction of the contract, their salary was payable in gold Turkish pounds only, and that their pensions are to be calculated accordingly. This contention is the same as has been dealt with in the previous decisions of the Board. In both cases, the appellant has maintained that the respondents are precluded by certain admissions from making the above contention, and, as their Lordships are of opinion that the respondent Menni is so precluded, they will first deal with the case of the respondent Mansour alone.

Until the British occupation of Palestine in the autumn of 1918, the law of Turkey was the governing law of Palestine. Haifa was occupied about the end of 1918. Up to that time, the salaries were paid in Turkish currency. From that time until 1927, Egyptian currency was mainly in use, but, in Nov., 1927, a new Palestinian currency was introduced, and the salaries were thereafter paid in Palestinian currency. After the British occupation, the salaries of Turkish pounds, as shown in the pay-sheets, were converted at a fixed rate into the prevailing currency; up till May, 1933, the first column expressed the fixed salary in Turkish pounds, but in that month this column was omitted from the pay-sheets, though it still formed the basis of calculation of the salary. Certain of the employees protested against this change. There is no doubt that the contract is to be construed according to the Turkish law, which, in the courts of Palestine, is now a question of fact. In the A present case evidence has been led on three points, which in substance is identical with the evidence led in the last case before this Board, *Ottoman Bank of Nicosia* v. *Chakarian* (1), the decision of which by this Board was delivered on Nov. 16, 1937, about nine months after the decision of the Supreme Court, which is now under appeal. Their B Lordships have no doubt that if the Supreme Court had had that decision of the Board before them, they would have found, in the evidence led in these cases, reasons for distinguishing them from the case of *Ottoman Bank of Nicosia* v. *Dascalopoulos* (2). MANNING, J., states that it had been agreed by both parties that the proper law of the contract is the C Ottoman law as it existed at the date when the contract was made.

The first of the three points established by the evidence is that, although the Turkish gold pound was current at the date of the contract, the proper construction of the contract, according to the Ottoman law, was that the pound Turkish referred to in the contract was a unit D of account, and was not a contract to pay Turkish gold pounds, in the absence of an express provision to that effect; in other words, it was a contract to pay so many pounds Turkish in whatever might be legal tender in Turkey according to Turkish law at the material time.

The second point established by the evidence is that at all material E times since the beginning of the war the paper pound Turkish has been legal tender, and that the Turkish gold pound gradually disappeared from circulation and ceased to be money, and became a mere commodity, with a price like any other merchandise.

The third point established by the evidence is that the practice— F "régime usité"—of the Bank in converting the amount of pounds Turkish payable as salary to their employees in Palestine at a fixed rate of conversion, did not constitute any admission that the salary was only payable in Turkish gold pounds, as the fixed rate was not the equivalent in value of the bullion contents of the Turkish gold pound.

G The first two points make clear that the basic salary of the respondent Mansour, which was Ltq. 23 on Dec. 31, 1933, as at which date his pension falls to be calculated, was payable by the Bank in pounds Turkish in the paper currency which was legal tender in Turkey at the time, and that the pension falls to be calculated on that basis, subject H to an observation, which may be best expressed by citation of a passage in the judgment in *Ottoman Bank of Nicosia* v. *Chakarian* (1), at p. 272 ([1937] 4 All E.R., at p. 576):

> So far this way of regarding the matter would appear to be conclusive against the respondent's contention, and to dispose of the appeal in favour of the appellants. It is necessary, however, to examine with some care the practice of the appellants in paying their employees, and in particular the course which they adopted in

> Turkey in paying the respondent and other employees after the Turkish currency went off gold. Reliance is placed by the respondent on these facts as being, in a phrase which was used, exegetical of the contract, and something like the principle of contemporaneous exposition was invoked. It is obvious that if a contract is clear and unambiguous its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly in special cases support, along with other appropriate evidence, a claim for rectification. In addition, the practice seems to be only consistent, when properly understood, with the construction which their Lordships have just enunciated.

The third point established by the evidence in this case makes the last sentence of that passage directly applicable to the present case, and the first and second points here established bring the present case within the rest of the passage. There is nothing in the present case to suggest any ground for a claim of rectification. The appeal by the bank in the case of the respondent Mansour succeeds on the foregoing grounds, and it is unnecessary to consider the appellant's contention that this respondent is precluded by admissions from maintaining his contentions as to the construction of the contract.

In the case of the respondent Menni, it is necessary to consider whether he is precluded by his admissions from claiming that he is entitled to his emoluments on a gold basis. After certain documentary evidence had been produced, and oral evidence had been led as to the additional allowances, which are no longer in question, the District Court made a provisional ruling on Jan. 22, 1936, in the following terms :

> Now as regards the question of estoppel which has been raised here, after considering the documentary and oral admissions of both parties, and the plaintiff relying upon the Law of Palestine which includes such provisions of the Mejelleh as have not yet been modified or repealed, and the defendant's advocates neither raising any objection nor requesting leave to prove the contrary on the question of the law applicable here, we have come to the conclusion that *prima facie* the plaintiff is estopped in law from prosecuting any further the claim which is now before us. We think that the Mejelleh as before mentioned provides us with the law in regard to estoppel which is binding upon this court and that no other law applies here. Having regard, however, to the provisions of the Law of Evidence Amendment Ordinance, 1924, as amended and in particular to the interpretation which has been placed upon the meaning and intention of sect. 12 in the Ordinance by the Court of Appeal, we consider that we are bound first to afford (if he so desires) the plaintiff the opportunity of giving evidence himself and/or of calling the defendant's representative as his witness to prove any fact relevant to the issue of estoppel, subject of course to his right later on may be to recall either himself or the defendant's representative to give further evidence which may be relevant generally to the issues herein if the court shall finally have decided the issue of estoppel in the plaintiff's favour.

In their judgment, delivered on Feb. 5, 1936, the District Court decided that the respondent was precluded by his admissions, and they state that the respondent had decided not to avail himself of the opportunity of giving evidence, which had been afforded to him by the provisional ruling. This decision was reversed by the Supreme Court, and, though no further evidence had been led, they decided in the respondent's favour on his claim to a gold basis. There is no record of any agreement to treat the evidence in the Mansour case as evidence in this case, and if their Lordships agreed with the Supreme Court that the respondent was not precluded by his admissions, it would be necessary that the case should be sent back in order that the parties might have the opportunity of leading further evidence. Their Lordships, however, agree with the decision of the District Court on this matter.

The claim of the respondent, which is at issue in the appeal, is for payment on a gold basis (*a*) of his pension, calculation of which is based on his fixed salary as at Dec. 31, 1932, and (*b*) of his salary from May 29, 1933, to Nov. 30, 1933, when he retired. Under art. 46 of the Palestine Order in Council of Aug. 10, 1922, the provisions of the Mejelleh are applicable in the courts of Palestine, and the appellant founds on certain articles, the translation of which by Grigsby (1895) is as follows:

> Article 79.—Each man is bound by his own admissions.
>
> Article 1606.—An admission by writing is equivalent to an admission made by word of mouth.
>
> Article 1609.—An admission of a debt which a person has written with his own hand or by means of another person, and, having signed or sealed it, has given it to another person, is equivalent to his admission by word of mouth, if it is regularly drawn up, i.e., in the accustomed manner, and the accustomed forms of receipt have the same validity.

As regards the claim in respect of salary, the appellant further founds on the following articles:

> Article 1536.—*Ibrai*, freeing one from an obligation, payment, abandonment, acquitment. These are of two kinds, of which the first is called *ibrai-iskat*, and the second *ibrai-istafa*. *Ibrai-iskat*, freeing, abandoning a debt, is where a person frees another from the obligation, abandoning the whole or part of his claim. This is the release (*ibrai*) of which mention will be made in this book. *Ibrai-istafa*, recovery, is where a person declares that he received his claim from another, thus, this is a kind of admission.
>
> Article 1562.—If anyone release another from his claim his claim is extinguished, he can no longer renew it.

The Supreme Court rejected the appellant's contention mainly on their view of the proper inference to be drawn from the signed pay-sheets and receipts given by the respondent, and, apparently, it was for that reason that they held that arts. 1536 and 1562 were not relevant to the circumstances of the case. But their Lordships do not agree with the Supreme Court nor with their view that art. 1655 has a bearing on the case, in view of the fact, already noted, that the respondent did not attempt to give evidence to qualify the clear meaning of his signature to the pay-sheets and the receipts given by him.

On the pay-sheet for the respondent's salary for December, 1932, the calculation of his salary is fully stated, and the respondent signed for receipt of the "net amount payable" as stated in the last column. The calculation is inconsistent with his present claim, and their Lordships are of opinion that this constitutes a clear admission by the respondent that the net amount is correctly calculated, and infers a release from the debt due to him by the bank, it being the customary form of receipt taken by the bank. It follows that the respondent is now bound by this admission as to the correct amount of his salary at the date material for the calculation of his pension. As regards his claim in respect of salary from May to Nov., 1933, the case is equally clear. In May, 1933, when the Bank dropped the first column from the pay-sheet, the respondent wrote a letter dated May 29 in which he protested against the change, but he did not persist in his protest, but signed unconditional receipts during the succeeding months, the last of which, dated Dec. 21, 1933, is for "the sum of Palestine pounds twenty-five and 381 mils only—for balance of my salaries from February, 1933, until end of November, 1933." This is clearly a release, by which his claim was extinguished, and he can no longer renew it.

Their Lordships are therefore of opinion that the respondent Menni's claim also fails, and that the District Court were right in dismissing his suit. Their Lordships will, accordingly, humbly advise His Majesty that the judgment of the Supreme Court dated Feb. 19, 1937, which related to both cases, should be set aside, and that the judgments of the District Court in Menni's case dated Feb. 5, 1936, and in Mansour's case dated Apr. 16, 1936, should be restored. The respondents will pay to the appellant the costs of this appeal, and will respectively pay to the appellant the latter's costs in their respective cases before the Supreme Court.

Appeals allowed with costs.

Solicitors: *Bischoff, Coxe & Co.* (for the appellants).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

ELLINGER *v.* GUINNESS, MAHON & CO., FRANKFURTER BANK A.-G., AND METALL GESELLSCHAFT A.-G.

[Chancery Division (Morton, J.), **July 28, October 6, 1939.**]

Practice—Service out of jurisdiction—Action properly brought against defendant within jurisdiction—Real defendant to action—Discretion of court—Non-disclosure not amounting to attempt to deceive court—R.S.C., Ord. 11, *r.* 1 (*g*).

An issue of gold mortgage bonds was made in Germany by a German bank to the defendants G. M. & Co., who issued them to the ultimate holders. G. M. & Co., who were an English firm, then established a register of the holders and by a deed of covenant covenanted with the holders whose names were entered upon that register to receive all principal sums and interest payable in respect of such bonds and to distribute the sums so received among such holders. In 1932 the plaintiff, being then domiciled in Germany, purchased such bonds to the value of 20,000 gold marks through the defendants Metall Gesellschaft A.-G., and these bonds were entered upon the register in the name of Frankfurter Bank or its nominees and the interest was received by Metall Gesellschaft and duly credited to the plaintiff. It was not suggested that the Frankfurter Bank or Metall Gesellschaft had any beneficial interest in the bonds. In 1936 the plaintiff was deprived of his employment in Germany and came to England. He obtained a release of a part of his foreign securities in consideration of his relinquishing his rights to the remainder. He now claimed to be entitled to an order that his name should be entered on the register kept by the defendants G. M. & Co. It was assumed that, as between the plaintiff and the Frankfurter Bank and the Metall Gesellschaft, the matter was governed by German law, and the matter was by agreement subject to the exclusive jurisdiction of the German courts. The defendants G. M. & Co. having been duly served within the jurisdiction, an order was made for the service of notice of writ out of the jurisdiction on Metall Gesellschaft A.-G., and the Frankfurter Bank A.-G. This motion was brought to set aside that order:—

HELD: (i) although it could not be said that the action was bound to succeed against G. M. & Co., there was a real issue to be tried and it was "properly brought" against them within the meaning of R.S.C., Ord. 11, r. 1 (*g*);

(ii) G. M. & Co. were not subsidiary defendants in the action, but were the real defendants;

(iii) this was not a case where the court, in the exercise of its discretion, ought to refuse to allow notice of the writ to be served on the defendants out of the jurisdiction. Non-disclosure of a material fact on the *ex parte* application is not in itself sufficient ground for setting the order aside. There must be an attempt to deceive the court.

[**EDITORIAL NOTE.** The person to be served out of the jurisdiction must be a necessary or proper party, but that person need not be both a necessary and a proper party. In the present case the parties outside the jurisdiction claimed no beneficial interest in the property, and asserted that any claim against them had to be determined in the German courts. It is held, however, that the order for service was properly made. The case also considers the other limb of the rule which requires that the action shall be "properly brought" against the defendant within the jurisdiction. This does not mean that the action must be seen to be one which can be prosecuted to success by the plaintiff, but there must be an issue between the plaintiff and the defendant within the jurisdiction.

AS TO SERVICE OUT OF THE JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-35, paras. 44-50; and FOR CASES, see DIGEST, Practice, pp. 355-362, Nos. 690-745. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 94-97.]

Cases referred to:

(1) *Rosler* v. *Hilbery*, [1925] 1 Ch. 250; Digest, Practice, 353, *679*; 94 L.J.Ch. 257; 132 L.T. 463.

(2) *Re Schintz, Schintz* v. *Warr*, [1926] Ch. 710; Digest, Practice, 358, *716*; 95 L.J.Ch. 393; 135 L.T. 350.

MOTION to set aside an order for service of notice of the writ on defendants out of the jurisdiction. The facts and arguments are fully stated in the judgment.

R.S.C., Ord. 11, r. 1, provides as follows:

1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever. . .

(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Andrew Clark for the applicants, the second and third defendants.

John G. Foster for the respondent, the plaintiff.

MORTON, J.: The plaintiff in this action is of Jewish birth. He was born in Germany and was professor in ordinary for pharmacology and director in the Pharmacological Institute of the Medical Academy in Dusseldorf, Germany, until 1933. In that year he was dismissed from his posts by reason of his Jewish birth, and in 1936 he left Germany and came to England. He was appointed to a registered fellowship at the Lister Institute for Preventive Medicine. In July, 1939, he became a naturalised British subject, and it is his intention to make his permanent home in England. He brings this action against Guinness, Mahon & Co., a firm carrying on business in London; Frankfurter Bank A.-G., a German Bank, hereinafter referred to as the Bank, and Metall Gesellschaft A.-G., a German company carrying on business as bankers, hereinafter referred to as Metall.

The plaintiff claims against Guinness, Mahon & Co., a declaration that he is entitled to be registered as the holder of an interest, of the nominal amount of 20,000 gold marks, in certain 6½ per cent. gold mortgage bonds of the Bavarian Mortgage and Exchange Bank, under the provisions of a deed of covenant dated July 18, 1927, and that he is entitled to be issued a certificate by Guinness, Mahon & Co., in respect of that interest. The plaintiff also claims as against Guinness, Mahon & Co., an order that these defendants register the plaintiff as the holder of that interest and issue to the plaintiff a certificate in respect thereof. The plaintiff further claims against Guinness, Mahon & Co. an injunction and further or other relief. As against the Bank the plaintiff claims (i) a declaration that the plaintiff is entitled to the certificate above referred to, (ii) an order that the Bank transfer to the plaintiff the benefit or interest of the nominal amount of 20,000 gold marks in respect of the bonds, (iii) an injunction to restrain these defendants from parting with or otherwise dealing with the certificates registered in their names with Guinness, Mahon & Co., unless and until a certificate for the nominal amount of 20,000 gold marks is issued to the plaintiff, and (iv) further or other relief. As against Metall the plaintiff claims (i) a declaration that Metall is the holder of or is entitled to a certificate of the nominal amount of 20,000 gold marks in respect of 6½ per cent. Gold Mortgage Bonds of the Bavarian Mortgage & Exchange Bank as agents on behalf of the plaintiff, (ii) an order that Metall transfer to the plaintiff the benefit or interest of the nominal amount of 20,000 gold marks in respect of those bonds, and (iii) further or other relief.

It is important to bear in mind that the plaintiff is resident in England and he wishes to be registered as the holder of an interest of the nominal amount of 20,000 gold marks in a register kept in England by Guinness, Mahon & Co., an English firm. That is the primary object of this action. The relief claimed against the Bank and Metall is subsidiary to the plaintiff's claim to be so registered. He has found it necessary to make the Bank and Metall defendants in this action for reasons which will appear later.

On Apr. 26, 1939, I gave leave to the plaintiff to serve notice of the writ in this action on the Bank and Metall out of the jurisdiction, under the provisions of R.S.C., Ord. 11. In support of the application for leave to serve out of the jurisdiction there was filed, on Apr. 17, 1939, an affidavit of Mr. D. H. Phillips, a member of the firm of solicitors acting for the plaintiff. On June 7, 1939, the Bank and Metall obtained leave to enter conditional appearances, and on June 26, 1939, the Bank and Metall gave notice of motion to discharge the order of Apr. 26, 1939. The notice of motion also asks that the notice in lieu of service of the writ given to the Bank and Metall, and also subsequent proceedings in this action as against these two defendants, may be set aside. The hearing of the motion came to an end on July 28, just before the close of the Trinity sittings, and I then dismissed the motion with costs and stated that I would give my reasons at a later date. Since July 28, war has broken out between this country and Germany, but no event happening after July 28 has any bearing upon this matter.

On July 18, 1927, the partners in the firm of Guinness, Mahon & Co. executed a deed of covenant. After recitals to the effect that Guinness, Mahon & Co. had entered into an agreement whereby 15,000,000 gold marks nominal amount of 6½ per cent. gold mortgage bonds of the Bavarian Mortgage and Exchange Bank were to be issued in Germany to Guinness, Mahon & Co. or their agents in that country and were to be deposited with the Royal Bank of Scotland or its agents in Germany, Guinness, Mahon & Co. covenanted with each and all the persons who for the time being should be registered in the register therein mentioned, and all other, if any, the persons entitled pursuant to the provisions thereof or by any act in the law to enforce the rights of persons so registered, to observe and perform the provisions thereinafter expressed. Clause 1 of the deed provides for the deposit by Guinness, Mahon & Co. of the bonds above referred to with the Royal Bank of Scotland or its agents in Germany. Clause 2 is as follows:

> Guinness Mahon & Co. shall receive all payments to be or which shall be made in respect of the bonds or under the said agreement for principal interest or otherwise and shall reasonably endeavour to obtain prompt payment of all sums so payable but shall not be under any obligation to take proceedings to enforce payment of any sums payable for amortisation sinking fund principal or interest unless they shall think fit, and subject to any indemnity against costs charges expenses and liabilities which they may require.

Clause 3 provides, *inter alia*, as follows:

> Every sum received by Guinness Mahon & Co. as owners of the bonds in respect of interest due thereon shall be paid and distributed by Guinness Mahon & Co. on the dates hereinafter mentioned amongst the persons entered on the register on the date appointed for the closing of the same as hereinafter mentioned *pari passu* and rateably in proportion to the nominal amounts of their registered holdings respectively on the said date.

By cl. 4 (*a*):

> Every such payment shall be made in sterling at London bankers' current buying rate for sight drafts on Berlin at the time at which such conversion shall actually be made provided that any registered holder shall be entitled on giving notice in writing to Guinness Mahon & Co. in manner hereinafter provided to receive payment of any sum so payable to him and due for distribution on or after Mar. 15, 1928, in German Reichs standard currency.

It is to be noted that the register is to be kept in London and that payments are to be made in sterling unless the registered holder gives notice to the contrary. It is also to be noted that under the deed Guinness, Mahon & Co. are not merely bare trustees. They have active duties to perform, and certain discretions are given to them.

In the year 1932 the plaintiff, being then domiciled in Germany, was minded to purchase 20,000 gold marks nominal of the bonds subject to the provisions of the deed of covenant, and he did this through Metall. On Oct. 1, 1932, Metall wrote a letter to the plaintiff of which the A translation is as follows:

> We give you below details of the securities assigned to you [here follow particulars of the cost and value of the 20,000 gold marks] with which we are debiting your account.

It is said on behalf of Metall, and for the purposes of this motion I accept B it, that the transaction between Metall and the plaintiff was governed by the general terms of business of Metall as then in force. I have carefully considered a translation of Metall's general terms of business, but I need only quote a portion of cl. 17 and the whole of cl. 18. By cl. 17 it is provided *inter alia* as follows: C

> Unless otherwise agreed upon for individual transactions our business offices constitute the place of fulfilment for both parties. In respect of our entire legal relations and any disputes between our customer and us, customers submit to German law and the competency of the District Court, Frankfort-on-Main and/or of the Provincial Court, Frankfort-on-Main, without prejudice to the right accruing to us to have recourse to the jurisdiction of another legally admissible court. D

Clause 18 is as follows:

> We are entitled to amend or supplement the foregoing terms of business at any time. Any such amendment or supplement cancels previous arrangements in conflict therewith. Such amendments or supplements are deemed to have been approved unless opposition is raised within one week by customers residing in the country or within a period of one month for foreign customers counting from the receipt of the E communication or if the business relationship is continued with us without opposition. Declarations of the customer which are in conflict with the general terms of business are not binding upon the Bank unless the latter declares itself in agreement therewith in writing.

Following upon this transaction a scrip certificate was issued by Guinness, Mahon & Co. either to the Bank or to two nominees of the bank— F the evidence is not quite clear upon this point. This was done on the instructions of Metall, and the Bank or its nominees hold the scrip certificate as bankers for Metall. The interest on the 20,000 gold marks was received by Metall and was duly credited to the plaintiff for some years. It is not disputed that the marks were bought with the plaintiff's G money nor is it suggested that either Metall or the Bank has any beneficial interest therein.

In the month of Aug., 1936, the plaintiff, having been deprived of his employment, left Germany and came to England. About that time he instructed his lawyer to endeavour to obtain the release of his foreign H securities. After some negotiations the plaintiff succeeded in getting a release of approximately one-third of his foreign securities on condition that he signed the following document, which he did on July 12, 1937:

> I, Professor Philipp Ellinger, hereby undertake, notwithstanding my emigration, to subject the securities [then follows a list, including the 20,000 marks] to all

> embargoes and restrictions which exist or may be issued for similar securities in the possession of a national. I undertake, moreover, at the request of the Deutsche Golddiskontbank to assign these securities to the latter for sale for my account abroad, the reichmark value of the proceeds achieved being credited to me in Emigrants Blocked Account. In like manner, I will deliver up the proceeds of such securities to the Reichbank; I likewise request that their equivalent value be credited to Emigrants Blocked Account.

The plaintiff's present position is that he is not receiving the interest on the 20,000 gold marks in question and that he is not in a position to deal in any way with these gold marks, since the bank or its nominees is or are entered as the holder or holders thereof in the register kept by Guinness, Mahon & Co.

In Dec., 1937, Metall altered its general terms of business and these terms now provide (by cl. 26) as follows:

> The business premises of the Bank's offices at which the account is kept are the place of fulfilment for both parties. German law is applicable to all legal relations between the customer and the Bank even in cases where an action is conducted abroad. The Bank can only be sued before a court at the place of fulfilment.

For the purposes of this motion I assume (without deciding the point) that this provision became binding upon the plaintiff.

Being dissatisfied with the present situation the plaintiff issued his writ on Apr. 6, 1939, and on the same date the solicitors of Guinness, Mahon & Co. wrote to the plaintiff's solicitors as follows:

> Our clients Messrs. Guinness, Mahon & Co. have handed us the writ of summons served upon them to-day. We shall have to consider the matter, but in the meantime you may accept this letter as an assurance that our clients will not pass any transfers which will have the effect of reducing the holding of the Frankfurter Bank A.-G., below 20,000 gold marks without giving you notice so as to enable your client to apply for an injunction, if so advised.

On May 17, 1939, Metall wrote two letters, one addressed to the Chief Finance President at Dusseldorf and the other addressed to the plaintiff in London. In the former letter Metall referred to the plaintiff's claim in the present action and stated:

> We are applying herewith for a *devisen* permit to fulfil plaintiff's claim against us.

By the latter letter Metall protested against the issue of the writ in the present action, reminded the plaintiff of the document which he signed on July 12, 1937, and stated:

> We have had to-day another opportunity of talking to the Foreign Exchange Board, Dusseldorf, in this matter and understand that they are determined to effect the confiscation of your property situate in Germany and/or your deprivation of German nationality mentioned in the last paragraph of our letter of the 4th instant unless at an early date it is certain that in accordance with the position of the matter you withdraw your unjustified threats of a writ.

In reply to the former letter the Chief Finance President at Dusseldorf wrote a long letter, the effect of which was that Metall was not given any permission to accede to the plaintiff's claim, and the letter concludes with the following paragraph:

> As Professor Ellinger has long since used the securities released by me abroad,

> it must be expected of him that he should abide by the voluntarily undertaken obligations and in particular for the assignment of the securities to the Deutsche Golddiskontbank. These undertakings are governed by private law in accordance with the declaration of July 12, 1937, since they contain *inter alia* an offer of sale to the Deutsche Golddiskontbank. Straightforward behaviour must be expected precisely from Professor Ellinger, since his application for a release was granted in an exceedingly generous way. Likewise from the standpoint of other emigrants, the attitude of Professor Ellinger is reprehensible, as he is endeavouring to secure unjustified special advantages for himself.

It may be a matter for discussion hereafter whether the document of July 12, 1937, signed by Professor Ellinger, can aptly be described as a "voluntarily undertaken obligation." However this may be, Professor Ellinger does not seem to think it "exceedingly generous" of the German Government to release to him one third of his own securities on condition that he relinquished control over the remaining two thirds, and he appears, so far, to be unmoved by the fact that the Chief Finance President at Dusseldorf thinks his attitude reprehensible.

In these circumstances counsel for the two German defendants contends that I ought to discharge the order of Apr. 26, 1939, for several reasons. In the first place he says that this action is not "properly brought" against Guinness, Mahon & Co. within the meaning of R.S.C., Ord. 11, r. 1 (*g*). He says that no action could properly be brought by the plaintiff against Guinness, Mahon & Co. and he relies upon the deed of covenant. In my judgment this argument is ill-founded. The result which the plaintiff desires to achieve in this action is that he shall be entered on the register kept by Guinness, Mahon & Co. in England. In order to achieve this result he was bound to bring an action, and Guinness, Mahon & Co. was, in my view, a proper defendant to the action. I do not think it is part of the function of the court, in considering whether an action is "properly brought" against a party within the jurisdiction, to arrive at a conclusion as to whether the plaintiff will or will not succeed against that party. It is enough if the court is satisfied that there is a real issue between the plaintiff and that party which the plaintiff may reasonably ask the court to try.

Counsel for the two German defendants further submits that Guinness, Mahon & Co. are really only "subsidiary defendants," and he relies on the cases of *Rosler* v. *Hilbery* (1) and *Re Schintz*, *Schintz* v. *Warr* (2). In my view, Guinness, Mahon & Co. are the principal defendants in the present case. They are the persons who keep the register and they have certain active duties to perform in regard to the gold marks in question. As I have already pointed out, the whole object of this action is to enable the plaintiff to be registered as the holder of these marks which were bought with his money. For this purpose he has brought this action against Guinness, Mahon & Co., who keep the register. By reason of the facts which I have stated it was necessary to make the two German parties defendants, but they are not parties who claim any beneficial interest in the subject-matter of the action. In my judgment the primary relief claimed is relief which is claimed against Guinness, Mahon & Co. and the facts of the present case clearly distinguish it from *Rosler* v. *Hilbery* (1) and *Re Schintz, Schintz* v. *Warr* (2).

For these reasons I think that so far the argument of counsel for the applicants fails, but he then points out rightly that the court has a discretion under R.S.C., Ord. 11, r. 1. If, contrary to his contentions, the action is "properly brought" against Guinness, Mahon & Co. he does not dispute that the two German defendants are necessary or proper parties to that action, but he argues that the court ought not to allow service out of the jurisdiction on these parties for certain further reasons which I shall now consider.

Counsel argues that there has been in the present case a submission to the exclusive jurisdiction of the German courts, by virtue of the terms of business under which the plaintiff carried through the transaction with Metall, as varied in the month of Dec. 1937. I think counsel is right in saying that there was in the present case an agreement that all disputes between the plaintiff and Metall should be subject to the exclusive jurisdiction of the German court at Frankfurt; but in my judgment this fact affords no good ground for setting aside the order of Apr. 26, 1939. I arrive at this conclusion for two reasons.

In the first place, as I have already pointed out, none of the parties, other than the plaintiff, claim any beneficial interest in the gold marks in question. This is not a case of a contest between two parties each of whom claims to be beneficially entitled to certain property vested in a trustee. In such a case, if one claimant has agreed with the other claimant that all disputes between them shall be determined according to the law of Germany, the court would, I think, incline to refer the parties to Germany for the decision of the dispute, in the absence of some strong reason to the contrary. In the present case, as I have said, the primary remedy which the plaintiff seeks is against Guinness, Mahon & Co. He wants to get on their register in London and he says that he is the beneficial owner of the gold marks. In order to decide this claim it is necessary for the two German defendants to be given the opportunity of putting their views before the court. There is not, however, a contest as to ownership between the plaintiff and Metall, or between the plaintiff and the Bank. The submission to the exclusive jurisdiction of the German courts is a submission only as between the plaintiff and Metall.

In the second place, I have before me evidence as to the probable fate of the plaintiff if he pursues his claim in Germany. Paras. 10 and 11 of the plaintiff's affidavit filed on July 24, 1939, are as follows:

> (10) As regards the contention that I should sue the defendants in Germany, I say that being a Jew I would have grave difficulty in getting represented especially in a case which would be regarded as injuring German financial interests. (11) If I were compelled to bring proceedings in Germany I would be unable to obtain any justice from a German court. Quite apart from any legal difficulty the German court cannot be expected to give judgment which would involve the release of foreign securities. Innumerable discriminatory measures taken by the present German regime against the Jews would greatly prejudice my position. It would be impossible for me to go to Germany because there would be grave danger of my

being sent to prison or to a concentration camp. In this connection I would like to refer to the letters from the Foreign Exchange Board and Metall dated May 3, May 4 and May 17, 1939. Although in view of my recent naturalisation in this country deprivation of my nationality would not affect me, the fact that such a step has been threatened shows what my position would be if I were forced to go to a German court. If I were compelled to institute proceedings in the court at Frankfurt A.M. my position would be particularly prejudiced in view of the fact that Metall has recently been taken over by a new management and that one of the Chief Directors is the son-in-law of the local leader (*Gauleiter*) of the Nazi A
Party.

The difficulties which would face the plaintiff if he had pursued his case in Germany are further explained in paras. 9 and 10 of the affidavit of Dr. Friedrich Alexander Mann, who is a fully qualified German lawyer and a Doctor of Laws of the Universities of Berlin and London, and B
who practises as a consultant on German law in London. I need not read these paragraphs at length. At the moment this evidence is not contradicted. In these circumstances it would in my judgment be wrong to refuse the plaintiff the opportunity of having this case determined by the courts in England. If it is to be so determined, the German C
defendants must be given an opportunity of defending it.

Counsel for the applicants next relies upon the fact that the plaintiff in his action seeks to compel two foreign corporations to do something which would render them subject to serious penal consequences in their own country. He says that in these circumstances I ought, in the D
exercise of my discretion, to refuse to allow these parties to be served with notice of the writ. It may be that when this action comes to be tried the court will decline to order either of the German defendants to do any act which would result in their becoming subject to the penal laws of their own country; but I do not think that on this ground I E
ought to discharge the order of Apr. 26, 1939, thinking as I do that this action is properly brought against Guinness, Mahon & Co. and that the German defendants are necessary parties to that action. The judge who tries the action will determine what relief (if any) is to be granted against these defendants. I am only deciding that they are parties who F
ought properly to be served with notice of the writ.

Counsel for the applicants indicated that he would contend at the trial that the rights of the parties were governed by German law and that in German law there is no cause of action, but he very fairly stated that he could not press that argument at the present stage, in view of the G
dispute as to German law which appears in the evidence.

The only other point taken by counsel for the applicants is that there was in the present case a failure to disclose material facts to the court, at the time when the order of Apr. 26, 1939, was made. He has strongly criticised the affidavits of Mr. Phillips. Counsel for the applicants says, H
and I agree with him, that the *ex parte* application under Order 11 is one upon which the utmost good faith must be observed by an applicant. He says further that certain facts were not disclosed which ought to have been disclosed, and he says finally that, if these facts had been disclosed, I would not have given leave for service out of the jurisdiction.

I now know all the material facts. I think that this is a proper case in which to give leave for service out of the jurisdiction under R.S.C., Ord. 11, r. 1 (*g*). In these circumstances, I do not think that the order giving such leave ought to be set aside unless that order was obtained by something which amounts to an attempt to deceive the court. Counsel for the applicants does not suggest that Mr. Phillips deliberately intended to deceive the court, but he argues that certain facts ought to have been stated in Mr. Phillips' affidavit which were not stated. I do not propose to refer to these facts in detail, but I think that Mr. Phillips' first affidavit does err on the side of brevity. I think it would have been a better affidavit if it had stated the facts in more detail, and in particular had made it clear that the transactions between the plaintiff on the one hand and Metall on the other hand took place at a time when the plaintiff was a German national domiciled in Germany, and that the terms of business provided that German law was to apply and the German courts were to have exclusive jurisdiction. Counsel for the plaintiff has stated that although Mr. Phillips had not a copy of the actual terms of business he was instructed by German experts as to the general nature of the terms of business under which the transaction must have been carried out. Mr. Phillips' second affidavit is directed to stating his reasons for omitting to state certain facts in his first affidavit. After careful consideration of the matter I do not think that there are sufficient grounds for setting aside my order of Apr. 26, 1939. A number of authorities have been cited on this branch of the case, but I have not been referred to any case in which a judge, being satisfied that there has been no intention to deceive the court, and being satisfied also, after considering all the relevant facts, that leave ought to be given for service out of the jurisdiction, has discharged a previous order giving such leave merely because certain relevant facts were not disclosed when such previous order was made. Counsel for the applicants has very properly pressed upon me certain observations of LORD HANWORTH, M.R., and WARRINGTON, L.J., in the case of *Re Schintz, Schintz* v. *Warr* (2) at pp. 716, 717 and pp. 723, 724. He argues that, if there has been non-disclosure of any material fact on the *ex parte* application, the *ex parte* order ought to be set aside, even if the judge, on being fully informed of the facts, thinks that the case is a proper one for allowing service of notice of the writ out of the jurisdiction. In my judgment that argument cannot succeed. In the absence of any attempt to deceive the court I do not think it would be right for a judge to take this course. The only result would be to put the applicant to the expense of making a further application under R.S.C., Ord. 11, r. 1, which would be bound to succeed. This point did not arise for decision in *Re Schintz, Schintz* v. *Warr* (2), since the Court of Appeal came to the conclusion that the case did not come within R.S.C., Ord. 11, r. 1 (*g*) at all. It follows that any observations of the Court of Appeal on the point which I now have to decide were *obiter*, and I must decide it as I think right.

For the reasons which I have stated I came to the conclusion on July 28 that this motion should be dismissed with costs.

Motion dismissed with costs.

Solicitors: *Mayo, Elder & Co.* (for the applicants, the second and third defendants): *Swann, Hardman & Co.* (for the respondent, the plaintiff).

[*Reported by* F. Honig and Maurice Share, Esqs., *Barristers-at-Law.*]

D'URSO *v.* SANSON.

[King's Bench Division (Simonds, J., sitting as an additional judge), **October 5, 1939.**]

Negligence—Defence—Volenti non fit injuria—Watchman returning to burning premises.

The plaintiff's husband was burnt to death in a fire which originated through the negligent manner in which the defendant's business was conducted. His duties were those of a night watchman, and it was proved that, after the fire had started, he made his way out of the building and, having given the alarm, ran back into the factory. Shortly afterwards he came out again when his clothes were burning fiercely. He later died from his injuries. It was not proved why he went back into the burning building, and it was contended that his injuries were the result of a voluntary act on his part, that is, his returning to a place of danger:—

Held: his duty was to guard the premises even in case of fire, and, in going back into the burning premises, he was acting in the course of his employment. The widow was, therefore, entitled to recover damages.

[EDITORIAL NOTE. The argument in this case is based on two well-known legal principles, those of *novus actus interveniens* and *volenti non fit injuria.* The point taken is that the returning into the burning building was a voluntary incurring of danger by the deceased, and that his death was due to this voluntary act and not to the negligence of the plaintiff. This argument is rejected on the ground that it was the duty of a night watchman to protect his employer's premises, and it was to be inferred that he returned to the premises for this purpose, unless it was shown that he returned for some private purpose of his own.

As to *Volenti non fit injuria,* see HALSBURY, Hailsham Edn., Vol. 23, pp. 715-719, paras. 1006-1009; and for Cases, see DIGEST, Vol. 36, pp. 92-97, Nos. 608-649.]

Action for damages for negligence causing death brought under the provisions of the Fatal Accidents Act, 1846, and also under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1. The facts are fully stated in the judgment.

R. T. Monier-Williams and *L. B. Schapiro* for the plaintiff.

Gilbert J. Paull, K.C., for the defendant.

Simonds, J.: In this case the plaintiff, Honora Ellen D'Urso, the widow and administratrix of the estate of Andrew D'Urso, deceased, sues Jacob Sanson, who trades as J. Woolf, claiming damages both under Lord Campbell's Act and under the recent Law Reform Act in respect of the death of her husband, Andrew D'Urso. That event took place in these circumstances. He was employed as a skin dresser by the defendant at his workroom at 34, Love Lane, Stepney. On May 22, 1938, at about 9.30 p.m., being then on duty with the defendant, he was burnt to death at the defendant's premises which I A have named. Many of the events which led to that unfortunate event necessarily rest upon guesswork and speculation, but this at least we know from an observer, Mr. Cole, who was passing the defendant's premises that night. As he was passing the deceased ran out of the gate of the factory and shouted out to him "Fire! Fire!" Mr. Cole saw B through the window of the factory a red glow, indicating that a substantial fire had started. He was unable, owing to the accident of the gate having closed and being only capable of being opened from the inside, to go to the assistance of the deceased, who ran back into the factory. However, a third party, hearing the cry, went to the fire alarm. C The fire brigade arrived within a short time; but, in the meantime, the deceased, having gone into the factory, came out again, having caught fire. He was described by the observer as being like a torch of flame. Every possible effort was made to quench the flames, but without avail and he was taken to the hospital, where in a short time he died. D The question is whether in respect of his death a claim is maintainable by the plaintiff. For the purpose of investigating that question it is necessary to see whether the deceased suffered his death by reason of the negligence of the defendant.

Now the negligence of the defendant is laid in this, that he provided E so faulty a system in his factory that that amounted to negligence. That I must now deal with. The factory is one in which the business of dressing skins is carried on. There is in the factory a boiler or a furnace which is used for drying skins in the ultimate stage of their preparation, but in the meantime the pelt or underside of the skin is prepared with F a special grease. Having been so prepared, it is put in a machine which is called a kicker, where some process of stripping takes place. It is then put into a revolving drum, together with a quantity of saw-dust for the purpose of taking out the grease with which the skins had formerly been impregnated. The skin is then taken out of the revolving drum G and submitted to further treatment which I need not describe, but the saw-dust which has been impregnated with grease in the course of this treatment is then used as fuel for the boiler which stands within the same factory building as I have mentioned. The position and nature of that boiler in the immediate proximity of this highly combustible material H has been described by counsel for the plaintiff as scandalous, and I do not think that he goes beyond the mark. By the expert witness who was called for the plaintiff, who was not contradicted by any evidence called for the defendant and indeed upon this point not seriously challenged in cross-examination, the plant was described as something such as in all his experience he had never seen before. In fact, the boiler was so constructed that it had a very large space between the head of the fire and the crown of the boiler—peculiarly apt, therefore, to create what is called the blow-back, and that was unguarded in the immediate proximity of a large quantity of highly combustible material. No special safeguards were installed for the protection of the factory. No special instructions were given in regard to the stoking of the furnace ; and, in my view, it is not going too far to say that the whole system of installation was one of really scandalous negligence. The fact was that not only did theory point to the possibility of blow-backs and of fire, but practice coincided with theory, for the experience of the witnesses who were called before me was that there had been frequent blow-backs, and on the very day on which this fatal accident occurred there had been no less than three. By " blow-back " I mean a blow-back through the grating or grate of the furnace, which caused sparks to be emitted into the building where this highly combustible material was lying about at no great distance from the mouth of the furnace. Those blow-backs occurred both when stoking was taking place and when stoking was not taking place. It was apt, indeed, to occur whenever there was a sufficient generation of gases in the open space which lay between the top of the fire and the crown of the boiler, and there being no plate over the opening at all, it was natural that the explosion of generated gases should find the easiest access, which might well be, in normal cases, not the flue, but the open hole of the grate.

Now on the very day upon which the fatal accident took place, there were no less than three such incidents, one when the fire was being stoked, and two when it was not. The deceased came on duty at about 8 p.m. on that Sunday. The fire had been made up at about 5.30 p.m. with a certain quantity of saw-dust and I think chips. It appears that the workman, in so tending the fire, did so in what might be described as a careless way. He appears to have fed it by holding the sack of saw-dust or chips over the mouth of the grate and pouring out the contents of the sack into the furnace—that is a possibility, of course—and that in so doing a spark was caused and that that spark was emitted and was somehow caught in the sack which had been held over the opening of the furnace. He observed no such thing. The sack was thrown down in the near proximity of the furnace and there it lay until its remnants were discovered after the fire. It is suggested that the fire was due to some such act of his, to a spark smouldering in the sack and ultimately bursting into flame. That I mention, because it is the only possibility which is suggested as an alternative to that which theory pointed to as likely and which experience had shown to happen with sufficient frequency in the past, namely a blow-back, followed by sparks being emitted and a smouldering which had to be put out. As I say, in the unfortunate absence of the deceased, there can be no absolute certainty as to the cause of the fire, but I think I should be flying in the face of all the facts, if I did not say I felt a certainty amounting to conviction that the fire was due, not to the fortuitous presence of those sacks, but to the existence of a faulty and scandalously negligent system of firing, which had in the past resulted in the emission of sparks and which was at any time likely to have that result. I accordingly find as a fact that the fire was due to a scandalously negligent A system introduced by the defendant in his works and I find that the plaintiff suffered his death by reason of a fire so occurring.

It is said, however, that, even though the deceased met his death in that way, yet the defendant is not liable, for he died, not as a result of the defendant's negligence, but by reason of some act of his own. That B is put in two ways, first, on the footing of *novus actus interveniens*, and secondly on the footing that he suffered that injury voluntarily; he was a volunteer. Now that demands a little examination. As I see it, the deceased was on the defendant's premises on that night of May 22, for the purpose of watching the premises in the defendant's interest. It is C put that he also had the duty—and I daresay he was glad so to occupy his time—of greasing certain skins, but I cannot doubt that a part, and a substantial, if not the major, part of his duty in premises of this kind, where a fire was kept going all night, was to watch the premises and to see that they were preserved from the danger of fire. The inference D which I draw is that it was part of his duty to be a night-watchman guarding the premises from the danger, amongst other things, of fire. Now what course exactly he took when he observed the outbreak of fire, or what he did, we never can know with certainty, but it appears to me that whatever course he took he was acting within the scope of his E employment, doing that which he could legitimately regard as his duty, and which indeed I think was his duty, having come out of the premises, whether or not he had already made some attempt to extinguish the fire, and having summoned aid, to go back again and to see what he could do in the course of his duty to preserve his employer's premises. F Now it is said that that is a wrong view to take, that the true view is that he was no more than a passer-by who thought fit to enter upon a stranger's premises and do what he could to avert a calamity of fire. It may well be—it is not necessary for me to pronounce upon it—that the development of our law, which has led to the doctrine of *volenti non* G *fit injuria* not being applied to the case where on a highway a man takes reasonable steps to prevent danger to the life of another, has no application where the act taken is for the protection not of life but only of property. Upon that it is unnecessary for me to pronounce, but it appears to me that that has no reference whatever to the case where H the actor is a person who does what he does in pursuance of the duty which his employment imposes upon him. It is unnecessary, in my view, to consider with any nicety whether, if he had abstained from doing that which he did, an action could have been brought against him for damages for breach of his duty. It is sufficient, I think, to say that a person who is employed, as this man was, to watch the premises and to guard them from fire, performs his duty, if, having gone out of those premises and placed himself in a position of safety, he yet returns again to that which was at all times part of his duty, to save the premises from fire. It is impossible, in my view, to postulate that, in doing that, he was doing something which went altogether beyond the scope of his duty so as to treat him as a volunteer. He was not a volunteer. He was doing that which was part of his duty and he was doing so as merely part of the single transaction which consisted of discovering the fire, taking some steps (it may be) to put it out, going out of the premises and calling for aid, and returning to do what more he could to save these premises. It has indeed been suggested that when, having put himself in a place of safety, he yet returned to the defendant's premises, he was doing that not for the sake of putting out the fire, but for the sake of recovering, it may be, some of his own possessions. I do not think that is a proper inference that I can draw. It seems to me the proper inference to draw is that he went to try, it may be once more, to put out the fire.

Upon that statement of facts, once the negligence of the defendant is found, there is no room either for the rule of *novus actus interveniens* or for the application of the doctrine *volenti non fit injuria*. In my view, the action must succeed and the plaintiff is entitled to recover the damage which is due to her.

Judgment for the plaintiff for £800 *under the Law Reform* (*Miscellaneous Provisions*) *Act*, 1934, *and for* £800 *under the Fatal Accidents Act*, 1846.

Solicitors: *Walter J. Lark & Co.* (for the plaintiff); *Davies, Arnold & Co.* (for the defendant).

[*Reported by* MAURICE SHARE, ESQ., *Barrister-at-Law.*]

NELSON *v.* COOKSON AND ANOTHER.

[KING'S BENCH DIVISION (Atkinson, J.), **October 5, 1939.**]

Public Authorities—Limitation of actions—Alleged negligence of medical officers of county hospital—Action against officers—Whether entitled to protection of Act—Public Authorities Protection Act, 1893 (*c.* 61), *s.* 1.

The two defendants were assistant medical officers at the West Middlesex County Hospital. It was alleged that they had negligently conducted an operation upon the infant plaintiff. This action was brought more than six months after the date of the alleged negligence and the defendants claimed the protection of the Public Authorities Protection Act, 1893. For the plaintiff it was contended that the defendants were independent contractors and not a public authority acting in pursuance of a public or statutory duty:—

HELD: as the duty imposed upon the public authority was one which could only be performed by individuals, these officers of a public authority were performing a public duty imposed upon the authority and entitled to the protection of the Act.

[EDITORIAL NOTE. This case formally decides a point which has long been assumed to be the law. There are many public duties imposed upon public authorities which can only be performed by its proper officers acting as the servants or agents of the authority, and the protection extends to those servants or agents, even when the action is brought against them personally and not against the authority.

AS TO PERSONS PROTECTED BY THE PUBLIC AUTHORITIES PROTECTION ACT, 1893, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-293, para. 610; and FOR CASES, see DIGEST, Vol. 38, pp. 102-106, Nos. 732-760.]

Cases referred to:

(1) *Greenwell* v. *Howell*, [1900] 1 Q.B. 535: 38 Digest 105, *751*; 69 L.J.Q.B. 461; 82 L.T. 183.

(2) *Freeborn* v. *Leeming*, [1926] 1 K.B. 160; 38 Digest 130, *955*; 95 L.J.K.B. 114; 134 L.T. 117.

(3) *Venn* v. *Tedesco*, [1926] 2 K.B. 227; 36 Digest 131, *871*; 95 L.J.K.B. 866; 135 L.T. 108.

(4) *Tilling (T.), Ltd.* v. *Dick Kerr & Co.*, [1905] 1 K.B. 562; 38 Digest 103, *737*; 74 L.J.K.B. 359; 92 L.T. 731.

PRELIMINARY POINT OF LAW ordered to be tried before the trial of the action. The facts and the statement of the point of law fully appear in the judgment.

S. H. Noakes for the plaintiff (respondent).

H. C. Dickens for the first defendant (applicant).

A. A. Pereira for the second defendant (applicant).

ATKINSON, J.: This is an action brought by an infant, Evelyn Muriel Nelson, by her next friend, claiming damages for personal injury. There are two defendants and they were both assistant medical officers employed at the West Middlesex County Hospital. The allegation is that they, or one of them, conducted an operation upon the infant plaintiff negligently, causing her some form of injury. The operation was apparently the removal of the tonsils, nothing very important perhaps in itself, but it was said that a gag, which was far too hot, was put in the child's mouth, which caused a serious burn on her face and left a scar which will be permanent. The defendants deny negligence, and among the defences raised was one claiming the benefit of the Public Authorities Protection Act. The action was not brought for more than six months after the alleged negligence and the defendants claim to be entitled to the benefit of that Act which bars all actions commenced more than six months after the accident complained of.

It was admitted that the West Middlesex County Hospital, where the operation was performed, had been transferred to the Middlesex County Council by the Poor Law Guardians in 1930, under the Local Government Act and that ultimately, with the sanction of the Ministry of Health, the hospital was appropriated for public health purposes, and that the council was empowered by the Local Government Act, 1888, as amended by the Act of 1929, to provide hospitals for that purpose. It was admitted that the hospital was being still maintained at the time of the alleged negligence. It was also admitted that the two defendants were assistant medical officers receiving a salary of £400 per annum each

from the authorities, but there was one fact which had not been admitted and that was that the operation was being performed in pursuance of their duties as servants or agents of a public authority. Defendants to-day tendered certain evidence to deal with that point. It did not seem to me that apart from consent I had any power to deal with disputed questions of fact, but ultimately counsel for the plaintiff very A
wisely, and I think very properly, agreed to the calling of this evidence and said that, if that evidence satisfied him on the points which he required to be elucidated, he would be content. The evidence was called and he was satisfied, and the matter then continued on the basis that that fourth fact which the plaintiff had been called upon to admit B
was admitted.

The matter comes before me in this way, that the point raised had been ordered to be set down for trial as a preliminary point, because if the defendants were right about it, it looked as if the action would be finally disposed of without all the expenses of a trial. The relevant C
words are contained in the Public Authorities Protection Act, 1893, s. 1 :

> Where, after the commencement of this Act, any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority . . . D

certain provisions shall have effect, the relevant one being that no action shall lie unless it is commenced within six months of the neglect complained of. The defendants claim to be entitled to the benefit of that provision, but the plaintiff denies this. It is curious that the precise point never seems to have been argued before. It has been recognised, E
I think, as law for a long time that if a public duty, or an act done in pursuance of a public authority, is being carried out by a public authority through some servant or agent, that servant or agent has the same right to the benefit of this section as the public authority would have. That certainly, I think, has been recognised as the law for some F
time. It was treated as good law in *Greenwell* v. *Howell* (1). I think common sense would indicate that that must be the position. Every public authority has to act by an agent or delegate or servant, and it would be idle merely to protect the public authority itself if the party complaining could bring an action against the actual person who had G
performed the act complained of. I do not gather that it is challenged in this case that that as a general principle is undoubted law ; but it is said that it is equally clear law that local authorities or hospital authorities under a county council are not responsible in law for the negligence of their medical officers and that, therefore, as the authority H
could not be sued, the medical officers as individuals can. It is agreed that if the authority could be sued for the alleged act, the medical officer also could be sued. But it is said that, where you get cases of acts done by servants or agents or delegates, whatever they are, in circumstances which would not render the authority liable to any action.

the person acting cannot claim the benefit of this statute. That, I think, would be quite an interesting point to discuss, and I do not know that one might not have been disposed to give some weight to that argument if it were not that the contrary seems to have been recognised as law in quite a number of cases. I need only refer to two of them, both reported in the year 1926. There is, first, *Freeborn* v. *Leeming* (2), where a plaintiff alleged that he had been negligently treated by a medical officer in a workhouse infirmary and sued the doctor more than six months after the termination of his attendance there. The question arose there as to whether the six months started when he began to suffer from that treatment or whether the six months started from the negligence alleged. That was the only point argued and, on p. 161, I find this:

> It was admitted that so far as his status and position were concerned he was so entitled,

that is, to the protection of this Act. I see that Mr. Edgar Dale was counsel for the plaintiff and the case went to the Divisional Court and then to the Court of Appeal, and as far as I can see nobody from first to last threw any doubt upon the soundness of that admission. Then there is the case of *Venn* v. *Tedesco* (3). There again there was an action being brought by a widow in respect of the death of her husband, and she sued the medical officers of the Croydon Borough Hospital alleging that their negligence was responsible for his death. He had died within six months of the negligence, but she had not brought her action until long after the six months expired, and the point argued in the case was whether the time during which she could claim was governed by Lord Campbell's Act, or by the Public Authorities Protection Act, 1893. McCardie, J., decided that she had the time given to her by Lord Campbell's Act. It would have been such a simple answer in that case to say: "Well, the Act does not apply to the medical officers of health," but in the judgment of McCardie, J., I find again, at p. 228:

> It is conceded that the defendants are within the class of individuals covered by the Public Authorities Protection Act, 1893.

Then when I look to see who conceded it, it was Mr. Neilson, K.C., and Mr. Carthew and, knowing McCardie, J., as we all do, a lawyer, if ever there was one, learned in case law and appreciative of principle, one is perfectly satisfied that he would not have accepted an admission of that kind unless he thought it right. It is very difficult to ask a court of first instance, in view of all this, to take a different view. I quite agree the matter has not been argued and made the point of a decision. It is still open to be dealt with, but when one finds that for quite a long time a certain rule has been accepted as law, it would take a great deal to convince one that it was wrong, and I am not satisfied that it is wrong. I think it is right. It seems to me that these two gentlemen were exercising what was really a public authority. It was an authority given to the Middlesex County Council to provide and conduct this hospital and to maintain medical services. Of course, they cannot do it with their own hands. The county council has not got its own hands. It has to act through other people, and this particular authority was being exercised by these two different men. It seems to me, therefore, that it is idle to say that they were not in fact acting in pursuance of a public duty or authority conferred on the Middlesex County Council. They were; A they were performing this public duty or public authority, whichever you like to call it, as agents for, or as delegates for and on behalf of, the council, and I think they are entitled to the benefit of the Act. It seems to me hopeless to regard them, as I am asked to do, as independent contractors. The case relied upon for that proposition is *Tilling* (*T.*), B *Ltd.* v. *Dick Kerr & Co.* (4), where the independent contractors were held not to be entitled to the benefit of the Act. In the judgment of WARRINGTON, J., at p. 570, there is this passage:

> It has been held that the protection of the Act extends to the officers of a public body and to persons acting under their direct mandate: *Greenwell* v. *Howell* (1); C but there is no case deciding that it extends to independent contractors.

It seems to me really almost an absurdity to ask me to regard them as independent contractors. They are not; they are officers of a public body performing a public duty imposed upon the county council, a duty which can only be performed through and by individuals. I think that D what was conceded in those two cases is good law; at any rate, it has been regarded as good law for so long that it must take a higher court than this to alter it. Therefore, I decide the point in favour of the defendants, and it seems to me that that finally disposes of the case and, therefore, under the rules I ought to give judgment for the E defendants.

Judgment for defendants with costs as between solicitor and client.

Solicitors: *Batchelor, Foord & North* (for the plaintiff (respondent)); *Hempsons* (for the first defendant (applicant)); *Le Brasseur & Oakley* (for the second defendant (applicant)). F

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

SELWOOD *v.* TOWNELEY COAL & FIRECLAY CO., LTD.

G

[COURT OF APPEAL (Slesser, MacKinnon and du Parcq, L.JJ.), **October 9, 1939.**]

Workmen's Compensation—Alternative remedies—Election between two remedies—Receipt of compensation—Knowledge of workman—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 29.

H

The plaintiff, a surface hand employed by the defendants, met with an accident, in consequence of which he was removed to hospital, where he remained for some months. While he was there, the defendants each week sent him money, which he received knowing that they had sent it as representing half his wages and as compensation under the Workmen's Compensation Act. After having received these weekly payments for some time, and, while still gravely incapacitated, he, acting under legal advice, informed the defendants that he did not wish to receive any further compensation, and shortly afterwards he made a claim at common law against them for damages for negligence causing the injuries which he had suffered and for breach of statutory duty. There was no evidence that the plaintiff at any time made a claim to receive compensation, neither was there any evidence that he knew what had caused his injuries or any of the facts which were subsequently investigated, beyond the fact that he was crushed by a tub :—

HELD : the fact that in the present case no claim for compensation had been made by the workman was not sufficient to distinguish it from *Perkins* v. *Stevenson* (1). Following that decision, the court therefore held that as the employer had paid compensation under the Act, he was not liable to a claim for damages at common law.

Decision of CROOM-JOHNSON, J., [1939] 2 All E.R. 132, *reversed.*

[**EDITORIAL NOTE.** In this case the Court of Appeal have held that they are bound by the decision of the Court of Appeal in *Perkins* v. *Stevenson* (1). It will be remembered that, in *Perkins* v. *Stevenson* (1), the whole amount of the compensation had, at the time the case was decided, been paid. In the present case it would appear that only a small part of that liability had been met, but it is held that the result is the same.

AS TO ALTERNATIVE REMEDIES, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 195, 196, paras. 430, 431 ; and FOR CASES, see DIGEST, Vol. 34, pp. 490-492, Nos. 4063-4071. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 478-483.]

Case referred to :

(1) *Perkins* v. *Stevenson*, [1939] 3 All E.R. 697 ; Digest Supp.

APPEAL by the defendants from a verdict and judgment of CROOM-JOHNSON, J., and a common jury at the Manchester Winter Assizes dated Mar. 20, 1939, and reported [1939] 2 All E.R. 132, where the facts are fully stated.

F. A. Sellers, K.C., and *Ivan Horniman* for the appellants.

D. P. Maxwell Fyfe, K.C., and *C. N. Shawcross* for the respondent.

Sellers, K.C. : There is a preliminary point. Since judgment was given in this case, *Perkins* v. *Stevenson* (1) has been decided in the Court of Appeal. That case is completely decisive of the point at issue here.

Fyfe, K.C. : The liability of an employer, both at common law and under the Workmen's Compensation Act, arises at the time of the accident. The exclusion of that liability arises when the employer is found liable to pay. All that *Perkins* v. *Stevenson* (1) decided was that, if a workman has gone so far as to make a claim, and the employer has paid, then the matter is concluded. There must, however, have been a claim. If the employer offers payments and the man accepts, there has been no claim.

SLESSER, L.J. : In this case judgment was given against the employers of a miner who was seriously injured as the result of an accident in a colliery, the details of which it is not necessary here to discuss ; but the jury in assessing the damages gave him £3,086 5*s.* 6*d.*, which considerable sum indicates their view of the gravity of the injuries which he had sustained. The employers, however, take on this appeal a preliminary objection, apart from other matters which they might have urged against the damages which were awarded in this case, that it was not competent for those damages to be awarded by reason of the Workmen's Compensation Act, 1925, s. 29. Subsect. (1) of that section provides : A

> When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act ; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act. . . . B

In the present case the judge tells us in his judgment that, whilst this unfortunate man was in hospital,

> somebody on behalf of his employers, the defendants, sent money to him each week, which he apparently received in the hospital and handed over to his wife. This money he received well knowing and understanding that it was sent to him by C his employers as representing half his wages based on the average of the 12 months preceding the accident, and that the money was sent to him as compensation under the Workmen's Compensation Act. At some time in or about the month of July, 1938, somewhere after the 22nd of that month when the plaintiff was still gravely incapacitated, he stopped taking these weekly payments and sent his wife to the colliery to say that he did not want any more compensation. That was because his solicitor told him so to do, or as he puts it, " Our solicitor informed us that we were to cease drawing this money." D

In the evidence which was given by Harold Selwood, the plaintiff, he was asked by the judge :

> Did you know that these payments which you had been receiving up to then were being paid to you under the Workmen's Compensation Act ?

and the answer was : E

> " I understood so, sir."

It is quite clear on the evidence and on the finding of the judge that this man was paid the compensation by the employers in respect of this accident and accepted the compensation upon the basis that it was F compensation under the Workmen's Compensation Act.

Now there has been in this court, since the decision of CROOM-JOHNSON, J., in this case, the decision in *Perkins* v. *Stevenson* (1). In that case there was a similar claim to damages for negligence and breach of statutory duty by a man who had applied for and had been paid G compensation under the Workmen's Compensation Act until Oct., 1938, by which date he had recovered from his injuries ; and it was there contended that, by reason of the fact that he had so received compensation after making a claim for it, he had barred any further claim at common law in accordance with sect. 29 of the Act. As is pointed out by SIR H WILFRID GREENE, M.R., at p. 703, the workman in that case said :

> " At the time when I made that claim and received those payments I knew nothing about my option under the sub-section, and, therefore, it cannot be said that I exercised that option at all. The first part of the sub-section, therefore, does not affect me."

but SIR WILFRID GREENE, M.R., comes to the conclusion that notwithstanding that the workman did not know what the effect of his claim would be in barring his right of action at common law, yet, at the same time, the effect of the statute was to preclude him from proceeding successfully at common law. He says this at p. 702 :

> The effect of the second limb of the sub-section is to exempt the employer from liability to pay compensation both under the Act and outside the Act.

MacKinnon, L.J., at p. 706, similarly says that in his opinion one of the difficulties would be this :

> If the present action had been allowed to proceed and succeed and the plaintiff had been awarded damages at common law, I can think of no legal ground on which the defendants could claim to deduct from the amount of those damages the £81 they had paid to him by those weekly payments.

Finlay, L.J., says :

> . . . I think that this particular case can be decided upon the ground upon which indeed the judge below decided it—that is, on what has been called the second limb of sect. 29 (1), which is as follows : "the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act. . . ."

Counsel for the workman, who has said everything which it is possible to urge in this case on behalf of the workman upon this head, has pointed out to us (and it is the fact) that there is this distinction between *Perkins* v. *Stevenson* (1), and the present case : in *Perkins* v. *Stevenson* (1) the workman had made a claim, albeit he did not know what the effect of the claim would be on his rights at common law, whereas here the employers had brought the man the payment in the first instance and he had accepted it by way of compensation. In my opinion, while that may make some distinction with regard to the first limb of sect. 29 (1) in the sense that that section dealing with claims or taking of proceedings does not apply to the case where the employer has offered, without any claim being made, to pay compensation and the workman has received it as compensation, it does not make any difference with regard to the second limb. If the contention of counsel for the workman were correct, the employer would be made liable to pay compensation to a workman injured by accident arising out of and in the course of the employment independently and also under the Act—the very thing which this statute says shall not be done. The mere fact that instead of waiting for the claim the employer pays the money and then it is taken by the workman as compensation—the immateriality, as was decided in *Perkins* v. *Stevenson* (1), of the fact of the claim—does not seem to me to distinguish it from the case where a claim is first made and compensation is afterwards paid, both of them being cases where the employer has paid compensation for injury to a workman and both being cases where, having paid that compensation, it is expressly stated that he shall not be liable to any proceedings independently of this Act. I would point out in conclusion the extraordinary result that would arise if the argument on behalf of the workman were correct. An employer, who was sufficiently generous to offer the compensation before there was any claim

made upon him which was subsequently received as compensation by the workman, would be liable, notwithstanding his generosity, to an action against him at common law, whereas the employer, who waited until such time as the workman made his claim and then paid, would be exempt from any such action. If that were the effect of the legislation I agree we should have to give effect to it; but, in my opinion, A
no such dilemma arises. As I think Finlay, L.J., pointed out in the *Perkins* case (1), the language of the second limb of sect. 29 (1) covers both the cases where there is liability to pay compensation, whether that liability is discharged by payment after a claim, or whether it is discharged before a claim and acknowledged as compensation by the B
workman. Of course, if the workman does not receive the money as compensation under the Workmen's Compensation Act, different considerations arise. If it is presented to him as a gift and he declines to take it that is another matter. Here this workman states quite frankly that he did so receive it under the statute as compensation. C

In my view, therefore, the case of *Perkins* v. *Stevenson* (1) must apply in principle to this case equally as to the case of a claim and this appeal succeeds on this point.

MacKinnon, L.J.: I agree. I think the principle that this court D
laid down in *Perkins* v. *Stevenson* (1) must apply to the facts of the present case. It is quite impossible for counsel for the workman to suggest any real distinction between the two cases. If *Perkins* v. *Stevenson* (1) was rightly decided, as I have to assume that it was, it is conclusive of the appeal in this case. I agree, therefore, that the appeal E
should be allowed.

du Parcq, L.J.: I have come to the same conclusion. The material words of the Act are:

> . . . the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently F
> of and also under this Act.

The reasoning adopted by this court in *Perkins* v. *Stevenson* (1), I understand to be this. An employer who has paid compensation under the Act, if judgment is given against him for damages in a common law action in respect of the same accident, will thereby be rendered liable G
to pay compensation both independently of and also under the Act. In such circumstances a judgment for damages in a common law action will necessarily contravene the second limb of sect. 29 (1) and, therefore, no such judgment can lawfully be given. That was, it occurs to me, clearly the *ratio decidendi* of *Perkins* v. *Stevenson* (1). Counsel for the H
workman in this appeal was driven to argue that that case was decided in this court on the first limb of the subsection and not on the second limb. The judgments of MacKinnon and Finlay, L.JJ., deal entirely with that second limb and it forms a great part of the judgment of Sir Wilfrid Greene, M.R.

Having said that, I only desire to add this. Speaking for myself, I am not at all sure that if I had not had the advantage of that authority I should have very readily seen that this result follows from the words of the Act of Parliament. The position here is that a workman, who did not even know or is not proved to have known that there were any facts which gave him a right to an action for damages at common law, has accepted, knowing it to be paid as compensation under the Act, a sum of money so paid. I think myself, to use the words which were used by Sir Wilfrid Greene, M.R., that the legislature clearly meant that the employer should not be made to pay twice over. I cannot help feeling some doubt whether the legislature has meant that, where the facts are such as I have summarised—that is, where a workman has taken a comparatively small sum in part payment of compensation—then, even though he may be prepared to account for it or return it, he is not to be permitted to bring his action for damages at common law. I say that in justice to the judge, because I sympathise with his difficulties and I feel that I might, in the absence of the authority which is before us, have come to the same conclusion as that to which he came. I agree that that authority is conclusive, that we are bound by it, and that the appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Peace & Ellis*, Wigan (for the appellants); *Robinson & Bradley*, agents for *Oddie & Roebuck*, Blackburn (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

GRIGGS *v.* PETTS.

[Court of Appeal (Slesser, MacKinnon and du Parcq, L.JJ.), **October 10, 1939.**]

Practice—Costs—Payment of money into court with denial of liability—Money left in court until day of trial—Application for leave to take money out of court—Whether defendant entitled to his costs after date of payment in—R.S.C., Ord. 22, r. 3.

The defendant paid sums of money into court with a denial of liability. The plaintiffs left the money in court until the case came on for hearing. They then applied for leave to take the money out in satisfaction of their claims. Leave was given and no order as to costs after the date of payment in was made. The defendant appealed, claiming that he should have been awarded costs after the date of payment in. The respondents contended that this was merely an order as to costs and that the Court of Appeal had therefore no jurisdiction in the matter:—

Held: (i) the order appealed was not one as to costs only, but one authorising the payment out of money in court. The Court of Appeal, therefore, had jurisdiction to entertain the appeal.

(ii) although costs are primarily a matter for the discretion of the judge, the present order was one which would cause injustice to the defendant, and was, therefore, one which the Court of Appeal had power to vary.

(iii) the respondents should only have been given leave to take the money out of court on the condition that they paid the appellant's costs incurred after the payment in. The case must, therefore, be sent back for trial.

[**EDITORIAL NOTE.** This case considers again the power of the Court of Appeal to vary an order of a lower court where the only question, in effect, is one of costs. Generally speaking, costs are so much a question for the discretion of the judge at the trial that the Court of Appeal will seldom interfere, but it has the power to do so where injustice would be caused.

As to Costs where Payment in is made, see HALSBURY, Hailsham Edn., Vol. 26, pp. 62, 63, paras. 100-104; and for Cases, see DIGEST, Practice, pp. 874, 875, Nos. 4157-4162. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, p. 371.]

Cases referred to:

(1) *Campbell (Donald) & Co.* v. *Pollak*, [1927] A.C. 732; Digest, Practice, 861, *4061*; 96 L.J.K.B. 1132; 137 L.T. 656.

(2) *Evans* v. *Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.

(3) *Wagstaffe* v. *Bentley*, [1902] 1 K.B. 124; Digest, Practice, 490, *1672*; 71 L.J.K.B. 55, 57; 85 L.T. 744.

(4) *Brown* v. *New Empress Saloons, Ltd.*, [1937] 2 All E.R. 133; Digest Supp.; 106 L.J.K.B. 331; 156 L.T. 427.

Appeal by the defendant from a decision of Humphreys, J., given at the Norwich Assizes and dated Feb. 14, 1939.

The facts of the case are fully stated in the judgment of Slesser, L.J.

Tristram Beresford, K.C., and *Gordon Alchin* (for *H. E. R. Boileau*) for the appellant.

Charles Doughty, K.C., *Greer Jackson* and *R. A. B. Powell* for the respondents.

Beresford, K.C.: This order should never have been made. It strikes at the whole root of the present system of paying money into court. The judge had no power to give judgment against the defendant without hearing evidence. The order should have been that the plaintiffs pay the defendant's costs from after the date of the payment in.

Doughty, K.C.: Costs are entirely a matter of discretion. This was an order as to costs, and this court has no jurisdiction to interfere with it. [Counsel referred to *Wagstaffe* v. *Bentley* (3) and *Brown* v. *New Empress Saloons* (4)].

Slesser, L.J.: In this case Lewis James Griggs and Hilda Mary Griggs sued one Charles Petts for damages for injuries sustained by reason of the negligent driving by the defendant of a motor car near King's Lynn on May 29, 1938. The statement of claim was delivered on Aug. 17, 1938, and contained particulars of negligence and alleged serious injuries to the two plaintiffs and gave particulars of loss. The defendant in a defence delivered on Oct. 26, 1938, denied the negligence and said that the accident was caused by a skid and that he could not by the exercise of reasonable care have foreseen or prevented the skid.

He also refused to admit that the plaintiffs had suffered damages. Then on Jan. 12, 1939, by notice served upon the plaintiffs the defendant stated that he had paid into court £700, apportioned as to £100 to satisfy the plaintiff Lewis James Griggs' claim and as to £600 to satisfy the claim of Hilda Mary Griggs, but denying liability. In the ordinary course of events the trial would have taken place at the assizes at Norwich but the actual trial in fact was postponed and took place upon Feb. 14, 1939, having been postponed from Commission Day, Jan. 25, 1939. The case then came on before HUMPHREYS, J., and, according to the shorthand note, counsel for the plaintiff then stated that his Lordship would not be troubled with the case, that he would take out the money which was in court, and asked for the usual order. That was a reference to R.S.C., Ord. 22, r. 3, which provides that if the whole money in court is not taken out under r. 2—that is within 7 days of payment in—the money remaining in court shall not be paid out except in satisfaction of the claim in respect of which it was paid in and in pursuance of an order of the court which may be made at any time before, at, or after trial. Counsel went on to say: that the costs were subject to the judge's discretion. Discussion then took place between the judge, and counsel on each side, and, as I read it, it is quite clear to my mind that counsel for the defendant was raising quite specifically the point that, so far as the costs were concerned, he was entitled, to quote counsel's own words, "to apply to your Lordship to give me the costs from the date of payment in, to be taxed. I am going to ask your Lordship to make that order here." It was on that basis and that basis only that counsel for the defendant took no objection to the judge making an order under R.S.C., Ord. 22, r. 3, as I have indicated; but in fact the judge drew up the order in such a form that it did not give to the defendant that for which counsel had asked. The order as drawn up read thus:

> It is this day adjudged that the male plaintiff recover against the defendant £100 and the female plaintiff recover from the defendant £600 and costs to be taxed up to the date of payment in, thereafter no order as to costs.

From that order the defendant appeals and he asks either that the trial between the parties should continue or that there should be a new trial, or, alternatively, that an order be made by this court giving him the costs after payment in. The first objection that counsel for the plaintiff takes to the argument of counsel for the defendant is this. He says that this court has no jurisdiction; he relies upon the well-known judgment in *Campbell* v. *Pollak* (1) and on the statutory provisions which say, by the Supreme Court of Judicature (Consolidation) Act, 1925, sect. 31 (1) (*h*), that no appeal shall lie without the leave of the court in a case as to costs only which are left by law to the discretion of the court, and he also relies on the rules made thereunder giving the court such discretion. In my view the order here appealed was not an order as to costs only which by law are left in the discretion of the judge.

The order which was sought by counsel for the plaintiff in the court below was an order of the judge authorising money which had been paid into court and had remained there more than 7 days to be paid out, and that is the order of which complaint is made in the present case. It is not an order as to costs only and, therefore, does not, in my opinion, fall within the ambit of the section which I have just read, sect. 31 of the Act of 1925, nor within the Rules of the Supreme Court dealing with discretion as to costs.

That being so, this question appears to me to arise, that this is a case where *prima facie* the judge has a discretion as the rule indicates, but that discretion is subject to appeal, and (as has recently been pointed out by LORD ATKIN in the case of *Evans* v. *Bartlam* (2), at p. 480, it is a mistake to think that the Court of Appeal has no power to interfere with the exercise of that discretion unless they think he acted upon some wrong principle of law. LORD ATKIN points out that while the Court of Appeal normally will not interfere with the exercise of the judge's discretion except on grounds of law, yet, if it sees that on other grounds the decision will result in injustice being done, it has both the power and the duty to remedy it. Then the question is this: is this order which I have read saying that no order should be made as to costs, one which would cause injustice to be done? In my opinion it would. The costs which the defendant has incurred after the payment in, which may be very great in certain cases, in other cases may be small —that is a matter for the taxing master—are costs which he need not have incurred had the money paid in been taken out before he incurred those expenses. They seem to me to be expenses wholly attributable to the failure of the plaintiffs to take out the money at an earlier date, or to apply to the court, if the time were over 7 days, for leave to take out those moneys which, as R.S.C., Ord. 22, r. 3, provides, is an application which may be made at any time before, at or after the trial. That was not done and the result is that the defendant has incurred expenses caused by the plaintiffs for which the order has given no remedy. In my view, therefore, he has suffered an injustice, the discretion of the judge in this case was wrongly exercised, and leave should only have been given upon the basis that the defendant should not have suffered the injustice of having to pay those costs.

The result of that appears to me to be that the appellant is right when he asks that this matter be now tried. As the matter stands the judge made an order for payment out to the plaintiffs which he ought not to have made. In those circumstances, that order being, in my view, an order which cannot be maintained, the case is in precisely the same position as if no order at all had been made. In those circumstances I think that that part of the notice of appeal, which asks that the action be sent back to the next Norwich Assizes for trial, is a request which ought to be complied with and that this court should order that the action be sent back to the next Norwich Assizes.

MACKINNON, L.J.: I agree, and I do not think I need add anything.

DU PARCQ, L.J.: I agree, and I also do not find it necessary to add anything.

Appeal allowed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellant, defendant); *Metcalfe, Copeman & Pettefar* (for the respondents, plaintiffs).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

TAN MA SHWE ZIN AND OTHERS *v.* KHOO SOO CHONG AND OTHERS.

[PRIVY COUNCIL (Lord Russell of Killowen, Sir George Rankin and Mr. M. R. Jayakar), **May 16, 18, 19, 22, June 22, 1939.**]

Privy Council—Rangoon—Conflict of laws—Succession—Buddhist—Chinese Buddhist domiciled in Burma—Burma Laws Act (xiii of 1898), *s.* 13.

Khoo Boon Tin, a Chinaman who was a Buddhist, died in 1906 childless, and at the date of his death he was domiciled in Burma. His widow, Tan Ma Thin, entered into possession of his property, obtained letters of administration to his estate and carried on his business, and engaged in other business. She died in 1929 possessed of considerable estate and by her will she made a number of charitable and other bequests, but made no residuary bequest and part of her property was not disposed of by her will.

In 1934 the respondent Khoo Soo Chong (a nephew of Khoo Boon Tin) instituted proceedings claiming that he was the sole heir to both his uncle and his aunt, either (1) as their adopted son, or (2) as the former's nephew, on the footing that Chinese customary law governed inheritance and succession to Chinese Buddhists in Burma, and that in any case the widow had only a limited interest in her husband's estate and had no right to dispose of it. The High Court at Rangoon, and on appeal the Division Bench, held that the respondent had failed to prove that the alleged adoption of himself was in fact made. They further held that Chinese customary law governed the succession under which the respondent was entitled to take, but the trial judge was not satisfied that under the law a childless widow had no rights in her husband's estate or in her own personal estate acquired after her husband's death:—

HELD: The law applicable in the circumstances of this case was the Burmese Buddhist law. The Burma Laws Act (xiii of 1898) applies, upon its proper construction, to all Buddhists in Burma and not only to those to whom Buddhist law is applicable in their country of origin.

[**EDITORIAL NOTE.** It has been said that adherence to family usages is a strong oriental habit, and it has been recognised by the reported cases that such family usages are carried beyond their country of origin by migrating families. Such matters, however, require special consideration of the particular circumstances of the case and of the character and nature of the usages of the country of origin.

AS TO LAW TO BE APPLIED IN CASES OF SUCCESSION, see HALSBURY, Hailsham Edn., Vol. 6, pp. 240-246, paras. 294-299; and FOR CASES, see DIGEST, Vol. 11, pp. 362-369, Nos. 436-491.]

Cases referred to :

(1) *Tan Ma Shwe Zin* v. *Tan Ma Ngwe Zin* (1932), I.L.R. 10 Ran. 97 ; Digest Supp.
(2) *Hong Ku* v. *Ma Thin* (1881), L.B. Select Judgments, Vol. 1, p. 135.
(3) *Fone Lan* v. *Ma Gyee* (1903), 2 L.B.R. 95.
(4) *Apana* v. *Ma Shwe Nu* (1907), 4 L.B.R. 124.
(5) *Man Han* v. *R.M.A.L. Firm* (1926), I.L.R. 4 Ran. 110.
(6) *Ma Yin Mya* v. *Tan Yauk Pu,* (1927) I.L.R. 5 Ran. 406.
(7) *Chan Pyu* v. *Saw Sin* (1928), I.L.R. 6 Ran. 623 ; Digest Supp.
(8) *Phan Tiyok* v. *Lim Kyin Kauk* (1930), I.L.R. 8 Ran. 57 ; Digest Supp.
(9) *Deedar Hossein (Rajah)* v. *Zuhoor-Oon Nissa (Ranee)* (1841), 2 Moo. Ind. App. 441 ; 16 Digest 147, *475*.
(10) *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (1839), 2 Moo. Ind. App. 132.
(11) *Surendra Nath Roy* v. *Hiramani Barmani* (1868), 12 Moo. Ind. App. 81.
(12) *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (1902), I.L.R. Cal. 433.
(13) *Balwant Rao* v. *Baji Rao* (1921), I.L.R. 48 Cal. 30.
(14) *Munshee Buzloor Ruheem* v. *Shumsoon-nissa Begum* (1867), 11 Moo. Ind. App. 551.
(15) *Rahim at bae* v. *Hadji Jussap & ors.* (1847), Perry's Oriental Cases 110.
(16) *Abraham* v. *Abraham* (1863), 9 Moo. Ind. App. 199.
(17) *Jowala Baksh* v. *Dharum Singh* (1866), 10 Moo. Ind. App. 511.
(18) *Ma Tin* v. *Doop Raj Bavna, Chan-Toon,* L.C. on Buddhist Law, Vol. 1, p. 370.
(19) *Mohammad Ibrahim Rowther* v. *Sheik Ibrahim Rowther* (1922), I.L.R. 45 Mad. 308.
(20) *Mailathi Anni* v. *Subbaraya Mudaliar* (1901), I.L.R. 24 Mad. 650.
(21) *Khatubai* v. *Mahomed Haji Abu* (1922), L.R. 50 Ind. App. 108.
(22) *Abdurahim* v. *Halimabai* (1915), L.R. 43 Ind. App. 35.

APPEAL from a judgment of the High Court of Judicature at Rangoon [ROBERTS, C.J., LEACH, J.], dated March 1, 1937, which reversed a judgment of the same Court in its original jurisdiction [SEN, J.], dated June 3, 1936.

The judgment of their Lordships was delivered by SIR GEORGE RANKIN.

A. M. Dunne, K.C., and *A. P. Pennell* for the appellants.

W. Wallach for the respondents.

SIR GEORGE RANKIN : The suit out of which this appeal has arisen was brought on Mar. 7, 1934, by the first respondent, Khoo Soo Chong, in the High Court at Rangoon in its original civil jurisdiction. The purpose of the suit was to establish that the plaintiff is the sole heir to the estates of his uncle, Khoo Boon Tin, and of Tan Ma Thin, this uncle's widow, either (i) as their adopted son, or (ii) as the former's nephew. It has been held in the High Court, both at first instance and on appeal, that the plaintiff failed to prove that the alleged adoption was in fact made, and, though this issue has been raised again before the Board, their Lordships see no reason to disturb the concurrent findings on this point.

The facts which bear upon the plaintiff's claim as nephew may be shortly stated. His uncle, Khoo Boon Tin, was the eldest of four sons of a Chinaman who lived in Burma. The family professed the Buddhist religion, and Khoo Boon Tin married Tan Ma Thin, also a Chinese and a Buddhist. He died in 1906 childless. Of his three brothers, the second son had predeceased him leaving no children. The third, Khoo Htwa Khan, survived till 1917, and died leaving 3 sons, of whom the plaintiff is the eldest, having been born on Mar. 31, 1905. The fourth son, Khoo Hine Htow, was alive at the time of the present suit, and gave evidence at the trial for the plaintiff. On the death of Khoo Boon Tin in 1906, his widow, Tan Ma Thin, entered into possession of his property, obtained letters of administration to his estate from the Chief Court, carried on his business, and engaged in other business. She died on Apr. 14, 1929, having made a will dated June 29, 1927. Her estate was sworn at over two lakhs of rupees. Probate of the will was obtained from the High Court on Aug. 24, 1929. By it she had made a number of charitable and other bequests, including a legacy of Rs.2,000 to the plaintiff, but she had made no residuary bequest, and part of her property was not disposed of by her will. If the Indian Succession Act applied to her will, the charitable bequests were invalid under sect. 118 thereof, as the will had not been deposited in accordance with the terms of that section. On Nov. 24, 1930, her sister, the first appellant, sued on the Original Side of the High Court for administration of her estate, claiming that the present appellants—that is herself, her sister and her brother—were the only heirs, and that the charitable bequests were invalid. The present plaintiff was not impleaded, and the suit proceeded against the other sister of the testatrix, her brother and her executors. The trial judge upheld the charitable bequests on the ground that the will was governed by English law and not by the Indian Succession Act, but, on appeal, PAGE, C.J., and CUNLIFFE, J., in *Tan Ma Shwe Zin* v. *Tan Ma Ngwe Zin* (1), held that the law to be applied to "Chinese Buddhists" was Chinese customary law, and remanded the case. On remand, it was held by SEN, J., on July 11, 1933, that the charitable bequests were valid and that each of the present appellants was entitled to one-third of the property not disposed of by the will.

Thereafter, on Mar. 7, 1934, some 28 years after the death of his uncle, and about 5 years after the death of his aunt, the respondent by his plaint in the present suit claimed that he was sole heir to both, on the footing that Chinese customary law governed inheritance and succession to Chinese Buddhists in Burma, and that in any case the widow had only a limited interest in her husband's estate, and had no right to dispose of it. In the High Court, both the trial judge (SEN, J.), and the Division Bench (ROBERT, C.J., and LEACH, J.), on appeal from him held that Chinese customary law governed the case. The trial judge, however, was not satisfied that under that law a childless widow had no rights in her husband's estate, or in her own personal estate acquired after the death of her husband. By his decree, dated June 3, 1930, he dismissed the suit. The Division Bench, however, proceeding largely upon JAMIESON'S CHINESE FAMILY AND COMMERCIAL LAW, held, in favour of the plaintiff, that, on the death of his uncle, the plaintiff should have been adopted by the agnates, and was entitled to the inheritance, that a wife is entitled to no estate of her own, as all she brings to her husband or receives vests in her husband's family, but that, as she is entitled to be in control of the inheritance during her life, time did not A run against the plaintiff till the death of Tan Ma Thin in 1929. The result of this decision was an order that an account be taken to ascertain that to which the plaintiff was entitled, with a direction that the only property to be excluded as property of Tan Ma Thin to which the plaintiff was not entitled was : B

> . . . ornaments and jewellery and valuables of the like nature together with silk stuffs and all property of whatever kind as [*sic*] may have been given by her husband to her in his lifetime.

The plaintiff can maintain this decree only if he establishes (i) that Chinese customary law governs the succession, (ii) that under it the eldest C son of the younger brother of the *propositus* takes in preference to his widow if he died childless, and (iii) that in her lifetime the widow is entitled to possession of the estate, so that her possession is not adverse to the nephew. By this appeal the two sisters and the brother of the widow, challenge each of these propositions. D

The first question is as to the law to be applied by the High Court at Rangoon to determine the person or persons entitled to succeed to the property in Burma of a Chinaman who was a Buddhist and who was domiciled in Burma at the date of his death. This question depends upon the true construction and effect of the Burma Laws Act (No. 13 E of 1898), s. 13, which provides as follows :

> (1) Where in any suit or other proceeding in Burma it is necessary for the court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, (*a*) the Buddhist law in cases where the parties are Buddhists. (*b*) the Muhammadan law in cases where the parties are Muhammadans, and (*c*) the Hindu law in the cases where the parties are Hindus, shall form the rule F of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law. (2) Subject to the provisions of subsect. (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction. (3) In cases not provided for by subsect. (1) or subsect. (2), or by any other enactment for the time being in force, the decision shall be according G to justice, equity and good conscience.

This section is in similar terms to those of sects. 6 and 7 of the Act No. 7 of 1872, sects. 4 and 5 of the Act No. 17 of 1875, and sect. 4 of the Act No. 11 of 1889. These enactments introduced into Burma a distinction which arose in Bengal as regards the law applied to Indians H (i) throughout the province by the company's courts and (ii) within the town of Calcutta by the Supreme Court. Subsects. (1) and (3) of sect. 13 above set forth correspond to the provision first made by Warren Hastings in 1772, later incorporated in s. 15 of Regulation IV of 1793, and now to be found in the Bengal, Agra and Assam Civil Courts Act, 1887, s. 37. This prescribed the law to be applied by the civil courts throughout the province of Bengal. It had special reference to what may be called family law and religious institutions, leaving other matters to the general principles of justice. It contemplated two classes only —namely, Mahomedans and Hindus. In applying it to Burma, the Indian legislature put Buddhists on the same footing as Mahomedans and Hindus, and "the Buddhist law" on the same level as the Mahomedan and Hindu laws. It introduced at the same time an express saving for custom which the Bengal enactments had never contained. Subsect. (2) above cited points to the provision made by the East India Company Act, 1780, s. 17, whereby jurisdiction within Calcutta was given or confirmed to the Supreme Court over Indians, but the law of England, which would otherwise have been the general rule of decision applied by the court within Calcutta, was excluded in favour of the Hindu or Mahomedan law so far as regards the matters mentioned in the section. This provision, when re-enacted in 1915 in the Government of India Act, 1915, s. 112, was generalised, and is not now limited by any specific reference to particular races or religions. It was never at any time confined to family and religious matters. It included "all matters of contract and dealing between party and party."

That these two different methods should have existed side by side for so long and should from 1872 have been applied to Burma is a remarkable fact, only in part explained by the consideration that over a wide field express legislation has in the interval superseded both, statutory codes like the Indian Contract Act and the Transfer of Property Act having provided for many matters a law common to all races and religions. As the present suit was instituted in the High Court, if not concluded by the provisions of subsect. (1), it will fall to be decided, if possible, under subsect. (2).

In the application of sect. 13 (1) above cited, difficulty has arisen out of the immigration into Burma of Chinamen some of whom profess the Buddhist faith. It does not appear that there is any Chinese form of Buddhist law, and, as regards succession and inheritance, the Chinaman who is a Buddhist is in China governed by customs or laws which are not connected with the religious beliefs of Buddhists and are applied equally to Chinamen who are not Buddhists. This is referred to as Chinese customary law, though it would seem that in or about 1930 a new code was introduced in China, and that parts of the "customary law" have from of old been codified. For a number of years the courts in Burma have been in doubt as to the effect to be given to subsect. (1) in these circumstances. In 1881, the difficulty was noticed by Sir John Jardine in *Hong Ku* v. *Ma Thin* (2), at p. 144:

> We all know that the courts apply different systems of both Hindu and Mahomedan law to people belonging to different races, countries or sects. I doubt, therefore, whether it is obligatory on our courts here to apply the Burman Buddhist law to Buddhists from Ceylon or China.

In *Fone Lan* v. *Ma Gyee* (3), Sir Charles Fox considered that by the words "Mahomedan law" and "Hindu law" the legislature meant "the laws applicable to such Mahomedan and Hindu parties, whencesoever such laws may be derived," and that:

> . . . the terms Buddhist law in the section must be read in the same way—namely, as meaning the law of succession, inheritance, marriage, etc., applicable to the Buddhist parties in the case. The personal law is left to all who are exempted from the operation of the Indian Succession Act. A

Accordingly, he applied the chinese customary law to the claim of the plaintiff to be an adopted daughter and to succeed to the estate of a Chinese Buddhist. This view was followed in a considerable number of cases, though it had been dissented from in *Apana* v. *Ma Shwe Nu* (4). B In *Ma Han's* case (5), Chari, J., considered that Chinese customary law had been applied as equity under subsect (3). He doubted the equity of this, but agreed that Burmese Buddhist law should not be held applicable, and said, at p. 114:

> The provision of the Burma Laws Act that Buddhist law shall apply in cases where the parties are Buddhist presupposes the existence of a Buddhist law applicable to the particular class of Buddhist before the court. C

In *Ma Yin Mya* v. *Tan Yauk Pu* (6), Maung Ba, J., referred to a full bench the question of the law to be applied to marriages in Burma between Chinese Buddhists. The question seems to have related to the form or ceremonial of marriage, and the discussion was to some extent clogged with questions D as to mixed marriages between Chinamen and Burmese women. It was held that the Burmese Buddhist law was applicable as the *lex loci contractus*, and that to escape from it a Chinaman must prove a custom contrary thereto. Thereafter the Division Bench which dealt with *Man Han's* case (5) on appeal applied Burmese Buddhist law to the E question whether or not a judgment creditor of a Chinese Buddhist could levy execution on the wife's share of their joint property.

In *Chan Pyv* v. *Saw Sin* (7), Pratt, J., regarded the full bench decision as applicable to the "law of marriage" only, and not to the "law of inheritance," and agreed with what Sir Charles Fox had said in *Fone* F *Lan's* case (3), which he regarded as settled law. Cunliffe, J., disagreed with the full bench decision, but thought it binding, though only as to marriage. He appears to have considered that "Buddhist law" could not mean Burmese Buddhist law unless the meaning of the word "Buddhists" was confined to Burmese Buddhists. Thereupon, in G *Phan Tiyok* v. *Lim Kyin Kauk* (8), there was referred to a full bench the question: Does Burmese Buddhist law govern the succession to the estate of a Chinese Buddhist who was born in China but who was domiciled and died in Burma? All 5 members of the full bench answered this question in the negative, but they varied in opinion as to the law H which does govern such succession. The suit in that case had been brought in the District Court of Amherst. Otter, J., considered that Chinese customary law was to be applied, though a Chinese Buddhist was just as much a Buddhist as a Burmese Buddhist. Heald, A.C.J., and Chari, J., thought that Chinese Buddhists were not Buddhists within the meaning of the section or of the exceptions to the Indian Succession Act, and that the Indian Succession Act applied to them *proprio vigore*. MAUNG BA, J., and BROWN, J., thought that the Chinese Buddhist was a Buddhist within the section, but that the provisions of the Indian Succession Act applied to him as a matter of justice, equity and good conscience under subsec. (3).

In 1932 as already mentioned, *Tan Ma Shwe Zin* v. *Tan Ma Ngwe Zin* (1), the suit brought by the first appellant in the High Court to administer the estate of her sister Tan Ma Thin, came before PAGE, C.J., and CUNLIFFE, J. The appeal was from a judgment of DUNKLEY, J., who had held that English law must govern the succession as a matter of justice, equity and good conscience under subsect. (3). The Division Bench did not regard itself as bound by the full bench decision in *Phan Tiyok's* case (8) to apply the English law or the rules of the Indian Succession Act, as the only question referred to the full bench had been the question whether or not Burmese Buddhist law applied. PAGE, C.J., with whom CUNLIFFE, J., agreed, held that a Chinese Buddhist is a Buddhist within the meaning of the Burma Laws Act and the Indian Succession Act, and that the case fell accordingly within sect. 13 (1). Applying subsect. (1), he proceeded on the ground that it was a fundamental principle of British policy that the particular habits and customs of the various communities under British rule should be recognised and respected. He continued, at p. 103 :

> But the language in which the section is couched is unfortunate for there is no law by which all Hindus or all Mahomedans are governed, and in the strict sense of the term no Buddhist law at all. The system of law applicable to Sunni Mahomedans differs from that to which Shiah Mahomedans are subject ; Hindus who follow the Benares school are governed by the Mitakshara, those who follow the Bengal school by the Dayabhaga ; while in the religious system known as Buddhism no rules of law concerning secular matters are laid down or prescribed. Bearing in mind the object that the legislature had in view, however, the meaning and effect of the expressions " Buddhist law," " Mahomedan law," and " Hindu law " in sect. 13, in my opinion, is plain, and sect. 13 (1) must be construed as laying down that in " any question regarding succession, inheritance, marriage or caste or any religious usage or institution " where the parties profess the Buddhist or Mahomedan or Hindu religion the rule of decision shall be the personal law that governs the community or religious denomination to which the parties belong, except in so far as their personal law in Burma " has by enactment been altered or abolished or is opposed to any custom having the force of law." In my opinion it would be neither reasonable nor feasable to construe the section in any other sense.

This decision was regarded by both of the tribunals in India who dealt with the present case as settling the law in the sense that Chinese customary law must in Burma govern the succession to a Chinese Buddhist. Had there in fact been a settled course of judicial decision in Burma upon the question, their Lordships would have been loath to disturb it, but, from their review of the decisions, it is abundantly clear that the important question now before the Board cannot be answered upon the mere principle of *stare decisis*. At the highest, it may be said that there is a substantial preponderance of opinion against applying Burmese Buddhist law to the case of a Chinaman who is a Buddhist.

BIBL. LONDIN. UNIV.

As to the consequences of this opinion—the choice between Chinese customary law and the principles of English law or the Indian Succession Act—the decisions are not settled but conflicting. The matter must now be determined upon the words of sect. 13 as a question of construction.

Their Lordships are in agreement with PAGE, C.J., that a Chinaman who is a Buddhist comes within the term "Buddhists" in sect. 13 (1) (*a*), A and cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist or on the ground that the law which governs him in China is not a specifically Buddhist, or even a religious, law. The same is true of the word "Buddhist" in the Indian Succession Act, 1865, and in the present Act of 1925. It follows from B this view, as PAGE, C.J., noticed, that subsect. (1) must be applied to such a case as the present. There would be little difficulty, were it shown that different schools of Buddhist law obtained in different places or among different peoples, in applying to Buddhist law the principle that in each case the appropriate school of law is that to which C the *propositus* or the persons concerned owned allegiance. As regards Hindu law, indeed, this principle has never been in doubt. Ample authority for it is to be found in decisions of the Board—as regards Mahomedan law, in *Deedar Hossein (Rajah)* v. *Zuhoor-Oon Nissa (Ranee)* (9); as regards Hindu law, in *Rutcheputty Dutt Iha* v. *Rajunder* D *Narain Rae* (10), *Surendra Nath Roy* v. *Hiramani Barmani* (11), *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (12) and *Balwant Rao* v. *Baji Rao* (13). This principle, however, does not justify the court in applying as Buddhist law a law which is not Buddhist at all, merely because it is applied generally in China to Chinamen without any special exception E for Buddhists. The law which is described in the statute as "the Buddhist law" is, like the Hindu and Mahomedan law, intended to be applied by the court as a law known to the court, and administered by the court of its own skill and competence. If the phrase *lex fori* be used in this sense, the Buddhist law, as SIR JOHN JARDINE observed in F *Hong Ku's* case (2), at p. 143, becomes under the Act one of several *leges fori*. It cannot be confounded or identified with a foreign law which has to be proved as matter of fact in each case by the appropriate evidence. It is doubtless true of the provisions made for Buddhists, Hindus and Mahomedans by the subsection, as it was of the parallel G provisions for Hindus and Mahomedans previously in force in Bengal, that the general intention of the legislature is that persons coming within these classes shall be governed by their own law. That is the intention which has always been attributed to Regulation IV of 1793, and to the Civil Courts Acts which took its place. It was never, perhaps, better H stated than by SIR WILLIAM JONES advocating the passing of such a regulation. In Lord Teignmouth's LIFE OF JONES, it is stated as follows, at p. 106:

> Nothing could be more obviously just than to determine private contests according to those laws, which the parties themselves had ever considered as the rules of

> their conduct and engagements in civil life : nor could anything be wiser than, by a legislative Act, to assure the Hindu and Mussulman subjects of Great Britain, that the private laws which they severally hold sacred, and violation of which they would have thought the most grievous oppression, should not be suppressed by a new system, of which they could have no knowledge, and which they must have considered as imposed on them by a spirit of rigour and intolerance.

A Moreover, in *Munshee Buzloor Ruheem* v. *Shumsoon-nissa Begum* (14), this Board said, at p. 614 :

> They can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision that their law, the application of which has been thus secured to them, is to be over-ridden upon a question which so materially concerns their domestic relations.

B The same principle is at the root of the decisions already referred to applying to Hindus and Mahomedans the school of law applicable to their particular family or sect. In the *Rutcheputty* case (10), a Hindu case, PARKE, B., based this construction of sect. 15 of Regulation IV of 1793 on the consideration that [p. 167] :

C

> . . . the law of succession of the Hindoos partakes greatly of their religious opinions and is part of their system.

In *Deedar Hossein* (*Rajah*) v. *Zuhoor-Oon Nissa* (*Ranee*) (9), a Mahomedan case, he said, at p. 477 :

> D Such is the natural construction of this regulation, and it accords with the just and equitable principle upon which it was founded, and gives effect to the usages of each religion, which it was evidently its object to preserve unchanged.

The principle was most succinctly stated by SIR ERSKINE PERRY in the well-known *Cutchi Memon* case (15) with reference to similar provisions in the East India Act, 1797, s. 13, establishing a Supreme Court E at Bombay and Madras as "the principle of *uti possidetis*."

However, while the policy or general purpose of the legislature in prescribing "the Buddhist law in cases where the parties are Buddhists" is not in doubt, and has full effect upon the general population of Burma, it is not open to the courts to adopt some other law for particular classes F of Buddhists by reason of the fact that the prescribed method will not in such cases attain the desired result. The statute has made such exceptions to the enforcement of Buddhist law as were considered necessary, including a highly important saving as to custom, and it does not admit of being interpreted in such a sense that Buddhist law G is only to be applied to Buddhists if it be the law prevailing in the country of their origin. The historical considerations to which their Lordships have alluded do not suggest that the intention of the subsection is to prescribe for each Buddhist, whatever law is found to govern him, but rather that all Buddhists shall be governed by a religious law which H is deemed to be theirs as Buddhists. This assumption may be in some respects ill-founded. The influx of Chinese into Burma may not have been expected, or the relation between religion and law in China may have been imperfectly understood, in 1872, when the rule now contained in the Statute of 1898 was first introduced, or in 1865, when Buddhists were excepted from certain provisions of the Indian Succession Act.

There may be difficulty and inconvenience in applying to Chinese Buddhists a law different from that which is applicable to them in China. It may therefore be that there is something here for reconsideration by the legislature. However, it is a problem *de lege ferenda*, and is not to be solved by interpreting the section in a sense of which it does not admit. Nor is a true construction of the section advanced by entertaining doubt whether the Buddhist law as it obtains in Burma really deserves so to be described, in view of its Indian origin and the indirectness of the influence of Buddhism thereon.

Some assistance is to be derived from the view taken by the Board in *Abraham* v. *Abraham* (16), which was distinguished in *Jowala Baksh* v. *Dharum Singh* (17). In the former case, before the Indian Succession Act, 1865, a Hindu family converted to Christianity had no law of inheritance imposed on them by statute, and, as a matter of equity and good conscience, its members were held to be governed by the law and usages which they had either retained or adopted. It was held in the later case, however, that this reasoning did not apply to a Hindu family which had embraced Islam, because [p. 537]:

> . . . the written law of India has prescribed broadly that in questions of succession and inheritance the Hindoo law is to be applied to Hindoos and the Mahomedan law to the Mahomedans.

Hence Hindu law could not be applied to them save on proof of special usage controlling the Mahomedan law, which was not in that case forthcoming.

Their Lordships find themselves in agreement with the view which was taken by the Judicial Commissioner, Mr. Burgess, in *Ma Tin* v. *Doop Raj Bavna Chan Toon* (18), a case of a Buddhist native of Chittagong who had settled in Burma:

> . . . *prima facie* as a Buddhist deceased would come under the Buddhist law of the country at large, and the burthen of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance.

In *Fone Lan's* case (3), Sir Charles Fox cited these words, and added, at p. 97:

> If by the words "country at large" he meant "the province of Burma" I venture to doubt the proposition. . . .

Their Lordships think, however, that the proposition is well founded. As a question of construction, this view is greatly to be preferred to the view that there is really no such law as Buddhist law, but only Burmese Buddhist law, and the consequences which it entails are not less reasonable or convenient than those arrived at by applying to a Chinese Buddhist in the name of justice, equity and good conscience those English principles of succession from which the Indian Succession Act exempted Buddhists.

To what extent and on what conditions the provision as to custom may enable a Chinaman who is a Buddhist to retain the usages of his country

of origin as regards matters mentioned in the subsection are questions of considerable moment upon this construction of subsect. (1). As observed by SIR LAWRENCE JENKINS, delivering the judgment of the Board in *Mohammad Ibrahim Rowther* v. *Sheik Ibrahim Rowther* (19), at p. 314, a case under the very similar provision of the Madras Civil
A Courts Act, 1873 (No. 3 of 1873), s. 16:

> In India custom plays a large part in modifying the ordinary law.

The importance of *kulachar* or family custom in the case of Hindus has given rise to a line of decisions by British Indian courts applicable to
B migrating families. Some of these have already been mentioned in this judgment, and *Mailathi Anni* v. *Subbaraya Mudaliar* (20), may be added as an instance of migration from without into British India. There are, moreover, cases of Hindu converts to Islam where it has been held [*per* LORD DUNEDIN in *Khatubai* v. *Mahomed Haji Abu* (21), at p. 112],
C that Hindu law "had been engrafted as a custom on the Mahomedan law," and the effect of migration as to these was considered by the Board in *Abdurahim* v. *Halimabai* (22), at p. 41. Such matters require special consideration of the individual facts of each case as well as of the nature and character of the laws or usages of the country of origin.
D The tenacity of customs of succession even under the strain of migration has been repeatedly recognised. As SIR JAMES COLVILE said in *Surendra Nath Roy* v. *Hiramani Barmani* (11), at p. 96:

> An adherence to family usages is a strong Oriental habit: it is in most places not a weak one.

E In the present case, it is not in dispute that the *propositus* Khoo Boon Tin and his wife Tan Ma Thin were Chinese Buddhists, and that, unless the plaintiff can show that the law applicable in Burma to them in questions of succession is Chinese customary law, his suit cannot succeed. Their Lordships are of opinion that the Burmese Buddhist law is the law
F applicable to them, and it is not contended that, according to that law, the plaintiff has any claim to be the heir of either. Their Lordships are further of opinion that, on the evidence adduced in the present case, it is not proved that, according to Chinese customary law, the plaintiff, as nephew, would be entitled, although not in fact adopted, to succeed as
G heir of Khoo Boon Tin in preference to the widow. No reliable expert witness was called to speak to this question, and, though the book relied on by the Division Bench may have been admissible under sect. 60 of the Indian Evidence Act, the conclusion drawn from its contents is drawn precariously, and from material both obscure and
H inadequate. The order of succession which is essential to the plaintiff's case is not established by the evidence either as matter of foreign law or as a custom, and his suit must fail. Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Division Bench should be set aside and that the decree of the trial judge, including his direction as to costs, should be restored. The

plaintiff will pay the appellants' costs of the appeal to the Division Bench and of this appeal.

Appeal allowed with costs.

Solicitors: *Lambert & White* (for the appellants); *Gard, Lyell & Co.* (for the respondents).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

WELLS AND SON, LTD. *v.* SIDERY.

[King's Bench Division (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **October 4, 13, 1939.]**

Street Traffic—Motor vehicle constructed to carry goods—Persons not to drive for continuous period of more than five hours and one half—Driver only actually driving for part of period of employment—Road Traffic Act, 1930 (*c.* 43), *s.* 19.

The appellants were road transport contractors who employed a driver for the purpose of driving a motor lorry. The activities of the driver were divided as follows. He commenced work at 7 a.m.; from 8 a.m. until 8.5 a.m. he drove the lorry from the appellants' premises to a wharf where the lorry was loaded without him taking part in the actual loading; from 11.30 a.m. until 12.5 p.m. he drove the lorry from the wharf to a warehouse where it was unloaded from 12.5 p.m. until 2.10 p.m., the driver again taking no part in the actual work of unloading. From 2.10 p.m. until 2.30 p.m., the driver drove the lorry back to the appellants' premises where he was immediately released from duty. The actual time of driving occupied little less than one hour, and on these facts the appellants were convicted for having permitted their driver to "drive for a continuous period of more than five hours and one half," contrary to the Road Traffic Act, 1930, s. 19, the magistrate including the time the driver had been standing by while the lorry was being loaded. On behalf of the appellants it was contended that the time spent by the driver in standing by was not time spent in "driving." On behalf of the respondent it was contended that the driver was employed in "driving" within the meaning of the Road Traffic Act, 1930, s. 19, for a period of seven hours and one half:—

Held: the driver was not employed in "driving" while standing by, and therefore was not so employed for a continuous period of more than five hours and one half.

[**EDITORIAL NOTE.** The question here concerns the method of computing the time spent in driving a motor vehicle. The Act provides that time spent on other work in connection with a vehicle or the load carried by it shall be included in the time spent in driving, but it is here held that the time during which the driver is merely standing by waiting for the loading or other work to be done by other workmen is not to be included.

As to Hours of Duty, see HALSBURY, Hailsham Edn., Vol. 31, pp. 745, 746, para. 1156; and for Cases, see DIGEST, Supp., Street and Aerial Traffic, Nos. 232k-232q.]

Appeal by way of case stated from a decision of the metropolitan magistrate, sitting at Tower Bridge Police Court, convicting the appellants of having permitted a driver to drive a goods motor vehicle for a continuous period of more than five hours and one half, contrary to the Road Traffic Act, 1930, s. 19 (1), (4). The facts and arguments are fully set out in the judgment.

Rt. Hon. Sir William Jowitt, K.C., and *David Karmel* for the appellants.

Valentine Holmes for the respondent.

HUMPHREYS, J. [reading the judgment of the court]: The relevant facts of this case, which is one stated by a metropolitan magistrate, are in a very narrow compass. The appellants, who are road transport contractors, were summoned for and convicted of an offence against the Road Traffic Act, 1930, s. 19 (1) (i), in that they

> on Apr. 23, 1938, at Canon Beck Road, Rotherhithe, in the county of London, did permit a person to wit W. Aimes employed by them to drive a motor vehicle, index mark and registration number X.W.5428, constructed to carry goods other than the effects of passengers for a continuous period of more than five hours and one half to wit six hours and thirty minutes.

The material words of the subsection are these:

> With a view to protecting the public against the risks which arise in cases where the drivers of motor vehicles are suffering from excessive fatigue, it is hereby enacted that it shall not be lawful in the case of . . . (*c*) any motor vehicle constructed to carry goods other than the effects of passengers; for any person to drive or cause or permit any person employed by him or subject to his orders to drive—(i) for any continuous period of more than five hours and one half; or (ii) for continuous periods amounting in the aggregate to more than eleven hours in any period of twenty-four hours commencing two hours after midnight; or (iii) so that the driver has not at least ten consecutive hours for rest in any period of twenty-four hours calculated from the commencement of any period of driving.

Then there follows a proviso which is not material to this case. The only question raised by the case is whether Aimes did on Apr. 23, 1938, drive a lorry belonging to the appellants for any continuous period of more than 5½ hours. It appears from the findings in the case that Aimes was responsible for and in charge of that lorry on the day in question from 8.5 a.m. to 2.30 p.m. During that time he was "driving," using that word in its ordinary connotation, for a total period of not more than 90 minutes. Counsel for the respondent, however, has argued that "driving" in this section is equivalent to "being employed as, and earning his wages as, the driver of the lorry," and he relied upon the language of sect. 19 (2). The subsection is as follows:

> (2) For the purposes of this section . . . (*b*) any time spent by a driver on other work in connection with a vehicle or the load carried thereby . . . shall be reckoned as time spent in driving.

Now, in our opinion, it must be to a great extent a question of fact in each case whether a driver, though not actually driving, can properly be said to be spending his time on other work in connection with the vehicle or its load so that the time so spent by him in other work may be reckoned as time spent in driving. What happened in this case is described by the magistrate as set out in the case in para. 4, sub-para. *x*. The magistrate in the earlier paragraphs had stated that Aimes commenced work at 7 a.m. and at 8 a.m. drove the lorry which arrived at Essex wharf about 8.5 a.m., and then the case continues:

> (*x*) That the said lorry and trailer were loaded at Essex wharf by the said Bennett and that the said loading continued until about 11.30 a.m. (*xi*) That while the

said lorry and trailer were being loaded as aforesaid the said Aimes stood by, that he spent part of the time at a coffee shop in the vicinity of the wharf, that he spent the remainder of the time in the company of other drivers watching the loading or in idleness and that at no time during the said loading did he do any work in connection with the said lorry and trailer or with the load which was being put upon the said lorry and trailer. (*xii*) That at about 11.30 a.m. the said Aimes drove the said lorry and trailer from Essex wharf to a warehouse in Canning Town and that the journey lasted just over half an hour. (*xiii*) That from 12.5 p.m. A until 2.10 p.m. the said lorry and trailer were being unloaded at the said warehouse, and that the said unloading was done by a warehouseman and an assistant, but the said driver was in attendance and was responsible for his lorry. (*xiv*) That while the said lorry and trailer were being unloaded as aforesaid the said Aimes stood by, that during part of the time the said Aimes ate his dinner at a distance from the said lorry and trailer, and that at no time during the said unloading did he do any actual work in connection with the said lorry and trailer or with the load which was being taken off the said lorry and trailer. (*xv*) That the said Aimes B finished his work at 2.30 p.m.

Whether those statements are regarded as findings of fact or as expressions of opinion, this court is not prepared to dissent from them, and those statements appear to us to be conclusive upon the point raised in the case. It is not to be forgotten that sect. 19 is expressed to protect C the public against the dangers which may arise if drivers are suffering from excessive fatigue, and para. (i) of subsect. (1) deals with one of the ways in which excessive fatigue may be brought about, other ways indicated being the matters prohibited in paras. (ii) and (iii) of that same subsection. D

There is, therefore, no ground for giving a strained or unnatural meaning to the word "work" in subsect. (2) (*b*) so as to include watching other men at work or "eating his dinner at a distance from the lorry." Counsel for the respondent also referred to and appeared to rely upon sect. 19 (2). That subsection provides as follows : E

> For the purposes of this section—(*a*) any two or more periods of time shall be deemed to be a continuous period unless separated by an interval of not less than half-an-hour in which the driver is able to obtain rest and refreshment.

In our opinion that provision only comes into operation when there are found to be periods of driving which in the aggregate total more than F 5½ hours. In this case we find there were not. It follows that, in our judgment, the magistrate, in holding, as he appears to have done, that for the purpose of sect. 19 Aimes' responsibility for the lorry was equivalent to spending his time on other work in connection with it, came to a wrong determination in point of law, and the question asked of us in G para. 9 of the case, which is, "whether, upon the above statement of facts, I came to a correct determination and decision in point of law," must be answered in the negative. The appeal is allowed and the conviction quashed.

Appeal allowed with costs. Conviction quashed. H

Solicitors : *Mawby, Barrie & Letts* (for the appellants) ; *The Treasury Solicitor* (for the respondent).

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

NUGENT *v.* PHILLIPS.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **October 16, 1939.**]

Street Traffic—Licensing of vehicles—Goods vehicle used to carry horse for hire or reward—Whether training of racehorses treatment in the course of trade or business—Road and Rail Traffic Act, 1933 (*c.* 53), *ss.* 1 (5) (*b*), 9 (1).

The appellant, who carried on business as a licensed racehorse trainer, held a private carrier's licence in respect of a motor horse-box, which licence was subject to the condition that the horse-box would not be used to carry goods for hire or reward. The appellant had a number of racehorses in training, including a horse owned by a Mrs. K., which was entered, and had been trained by the appellant, to run at Warwick races on Nov. 23, 1938. For this purpose the horse was carried in the horse-box to and from Warwick races for the sum of £5 5*s*., which Mrs. K. agreed to pay the appellant. The appellant was charged with having unlawfully failed to comply with the condition in that he used the horse-box, being an authorised vehicle under the licence, for the carriage of goods for hire or reward contrary to the Road and Rail Traffic Act, 1933, s. 9 (1). On behalf of the appellant it was contended that the training of racehorses is treatment within the meaning of the Road and Rail Traffic Act, 1933, s. 1 (5) (*b*), which provides that the delivery or collection by a person of goods which have been or are to be subjected to a process or treatment in the course of a trade or business carried on by him shall not be deemed to constitute a carrying of goods for hire or reward; that, as the horse had been trained by the appellant immediately prior to its conveyance to Warwick races, and was to undergo further training on its return, the horse-box was being used to deliver and collect the horse in circumstances which did not constitute a carrying of goods for hire or reward. The respondent denied that the running of races by horses is treatment within the meaning of sect. 1 (5) (*b*) of the Act of 1933:—

HELD: the motor vehicle was used for hire or reward, and the horse was not the subject of a process or treatment within the meaning of sect. 1 (5) (*b*) of the Act of 1933.

[**EDITORIAL NOTE.** The case stated in the present matter is one which was stated by agreement between the parties for the purpose of deciding the question which form of licence was required in such a case. Some uncertainty has been felt upon the matter, which is set at rest by the decision herein.

AS TO CLASSES OF LICENCES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 799, 800, para. 1255; and FOR CASE, see DIGEST, Supp., Street and Aerial Traffic, No. 76aa.]

APPEAL by way of case stated from a decision of the justices for the county of Berks, sitting at Abingdon. The facts are fully stated in the judgment.

David Karmel for the appellant.

H. P. J. Milmo for the respondent.

LORD HEWART, L.C.J.: The provisions of Part I of the Road and Rail Traffic Act, 1933, are, I think, perfectly precise. By sect. 2 (4) it is provided:

> A private carrier's licence (in this Part of this Act referred to as "a C licence") shall entitle the holder thereof to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him, subject

> to the condition that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward.

In this case the justices had to deal with a private carrier's " C " licence, which was subject to the conditions already named, and the justices came to the conclusion that on this occasion the vehicle so licensed " was being used for the carriage of goods for hire or reward." They held, therefore, that an offence had been committed. The facts of the case are to the effect that the appellant, at the material time, had various racehorses in training, including a horse owned by a Mrs. King. That horse had been trained by the appellant to run in a particular race at Warwick on Nov. 23, 1938, and the case finds that :

> Mrs. King instructed the appellant to send the said horse to Warwick races aforesaid by horse-box . . . Mrs. King agreed to pay the sum of £5 5*s.* to the appellant for the carriage of the said horse by horse-box to and from Warwick races aforesaid.

Accordingly the appellant caused the horse to be placed in that horse-box, and the horse-box was then driven by the person employed by the appellant to Warwick. In those circumstances it seems to me quite impossible to contend that this was not a use of that motor vehicle for hire and reward. Counsel for the appellant apparently seeks to dwell upon sect. 1 (5) (*b*). That subsection states that certain things are not to be deemed to constitute a carrying of goods for hire or reward. It refers to :

> the delivery or collection by a person of goods which have been, or are to be, subjected to a process or treatment in the course of a trade or business carried on by him . . .

The suggestion, therefore, is that we are to regard this horse, for the purposes of this section, as " goods which have been or are to be subjected to a process or treatment in the course of a trade or business carried on by " the trainer. That, I think is an argument which nobody would dream of putting forward, except for the purpose of maintaining a controversial position. I think it is a contention which answers itself and that these justices were manifestly right. I think, therefore, that this appeal ought to be dismissed.

CHARLES, J. : I agree.

HUMPHREYS, J. : I agree.

Appeal dismissed.

Solicitors : *Peacock & Goddard*, agents for *A. W. Taylor, Son & Corpe*, Bristol (for the appellant) ; *Treasury Solicitor* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

CLARK *v.* SMITH.

[COURT OF APPEAL (Slesser, MacKinnon and du Parcq, L.JJ.), **October 10, 11, 1939.]**

Bankruptcy—Bankrupt's business carried on by trustee in bankruptcy—Guarantee against loss given by defendant—Loss incurred—Action by trustee to recover loss—Whether action maintainable—Public policy—Illegal contract—Consideration—Bankruptcy Act, 1914 (*c.* 59), *s.* 56 (1).

J., who ran an eating-house, was adjudicated bankrupt on Nov. 13, 1937. At the request of the defendant, the trustee in bankruptcy carried on the business, and the defendant entered into a guarantee to secure the estate against loss. The business was run at a loss, and the present action was brought by the trustee on the guarantee :—

HELD : (i) the trustee in bankruptcy was not merely carrying on the business so far as was necessary for its beneficial winding up, and was therefore carrying it on contrary to the provisions of the Bankruptcy Act, 1914, s. 56 (1).

(ii) this was no defence to the guarantor, as it was only a creditor who could impeach the transaction.

(iii) the contract of guarantee was not void as being contrary to public policy.

(iv) there was sufficient consideration moving from the trustee to support the contract, because, if the business were carried on, a profit might be made.

(v) the guarantee was therefore enforceable, and the action succeeded.

[EDITORIAL NOTE. DU PARCQ, L.J., has not found it possible to dissent here, but he has expressed some doubt on the view taken by the majority. He takes the view that, if it is plain that it is against the interests of the creditors to carry on the business for the purpose of its beneficial winding up, then the existence of a guarantee is of no assistance to the trustee. On the other hand, where the continuance of the business for a period may possibly be of advantage to the creditors, the existence of a guarantee may turn the scale and justify the continuance as a beneficial winding up.

AS TO CARRYING ON BUSINESS BY TRUSTEE IN BANKRUPTCY, see HALSBURY, Hailsham Edn., Vol. 2, p. 168, para. 221 ; and FOR CASES, see DIGEST, Vol. 4, pp. 212, 213, Nos. 1975-1979.]

Cases referred to :

(1) *Re Batey, Ex p. Emmanuel* (1881), 17 Ch.D. 35 ; 4 Digest 213, *1976* ; 50 L.J.Ch. 305 ; 44 L.T. 832.

(2) *Re Branson, Ex p. Trustee*, [1914] 2 K.B. 701 ; 5 Digest 987, *8075* ; 83 L.J.K.B. 1316 ; 110 L.T. 940.

(3) *Lee* v. *Sangster* (1857), 2 C.B.N.S. 1 ; 5 Digest 979, *8019* ; 26 L.J.C.P. 151 ; 29 L.T.O.S. 93.

APPEAL by the plaintiff from a decision of CHARLES, J., at the Lewes Assizes dated Mar. 28, 1939. The facts of the case and the arguments are fully set out in the judgments.

Linton Thorp, K.C., and *C. J. T. Pensotti* for the appellant.

Harold J. Brown for the respondent.

SLESSER, L.J. : In this case an action was brought by Leslie Colbatch Clark, who was at all material times trustee in bankruptcy of William Thomas James, against Agnes May Smith, on a guarantee dated Jan. 12,

1938. The amount due on the guarantee everybody admits is £138 15*s*. 3*d*. The material facts of the case are these. William Thomas James had an eating-house at Brighton, which was unsuccessful. On Nov. 13, 1937, he was adjudicated bankrupt; and Clark, the plaintiff, was appointed the trustee. There was a committee of inspection, which met on Dec. 31, 1937, and reported a loss. At that time the defendant A entered into a guarantee, not the guarantee now sued upon, but an earlier guarantee, the language of which is not now material. This earlier guarantee was given not to Clark, but to the Official Receiver. It was only for a limited time, namely, until the first meeting of creditors had been held, and nothing now turns upon it. B

Thereafter there was a creditors' meeting; and a new guarantee was subsequently given in the following circumstances. The committee of inspection met on Dec. 9, 1937, and the following entry appears. After some discussion the trustee stated the gross takings of the cafe for the period during which it was carried on by the Official Receiver C and for the three weeks to Dec. 28. He estimated the charges for rent, rates, lighting, heating and other amounts. After charging this figure, the loss made during the official receivership period of trading was approximately £27. He thought that this would be made up over the Christmas period, although definite figures were not yet available. There D was no doubt that the hotel would not pay its way during the winter; but it was anticipated that there would be a considerable profit during the summer. The trustee stated that an offer of £200 for the stock, furniture, fixtures and fittings had been received from E. Tully. Then it appeared that if this offer were accepted, there would not be sufficient E to pay the preferential creditors and there could not be any dividend to the unsecured creditors. Consequently, it was resolved that the hotel should be carried on for the present, and that the defendant should be asked to renew the guarantee which she had given to the Official Receiver. Mrs. Smith agreed; and gave the guarantee which is the F subject-matter of this action.

It is said, now that the guarantee is sought to be enforced, that the evidence shows that this business was being carried on contrary to the provisions of the Bankruptcy Act, 1914, which provides by sect. 56:

> The trustee may, with the permission of the committee of inspection, do all G or any of the following things: (1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same . . .

The judge in his judgment has come to the conclusion that the business was not being carried on by the trustee as required by that subsection. He says: H

> The only question is whether the conduct of the Trustee in Bankruptcy is so irregular as to force me to the conclusion that he was not carrying on the business for the beneficial winding-up of the business. I have no doubt from his own evidence that he [the trustee] was intervening for another purpose. He was involved with the defendant who came and told him over and over again that the only purpose of her guarantee was that James [the bankrupt] should be able to go on in that business, not that the estate should benefit, not that there should be a beneficial

> winding up of the estate. £200 was offered and the trustee in bankruptcy could have accepted it. Instead of that, I find upon the evidence that at the behest of the defendant he was in fact influenced and biased in the action which he took in carrying on this business by, as he has sworn to me, his desire to help Mr. James in his difficulties.

The evidence in my judgment amply supports the conclusion at which the judge arrived. It is not necessary, I think, here to consider that part of the history of the case which showed how the defendant orally withdrew her guarantee and then orally again renewed it. But it is clear to my mind that Clark, although he says in cross-examination that what he did was solely for the purpose of the beneficial winding up of the business, did in fact accept the guarantee and agree to carry on the business for other purposes. For instance, on p. 3 of the evidence he said that the defendant was a friend of James, and that, so long as the business continued, James would be manager of it, and consequently would have a job. Then he says:

> I explained to her that it was extremely improbable that it could make any profit during the winter. . . . The position was rather this, that I could carry on the business if I had a guarantee, and if the Committee approved. . . . I asked her into my private office, and she said that she wished the guarantee to remain, or rather, that she wished the business to be carried on. She explained that she had seen James, and they had kept it open; and in view of the continuance of the guarantee, I was quite agreeable to that.

There are other passages which to my mind support the conclusion of the judge that this business, though no doubt in part it was carried on for what was conceived to be the ultimate benefit of the creditors, was in part carried on at the request of the defendant to assist James, and also in order that the business might go on generally.

Another reason why I have come to the conclusion that the judge was right, is afforded by *Re Batey, Ex parte Emmanuel* (1). In that case it was held:

> The creditors of a bankrupt trader have no power to authorise the trustee to carry on a business of the bankrupt, except so far as may be necessary for the beneficial winding-up of the business.

In that case, as appears particularly from the judgment of Cotton, L.J., at p. 43, the creditors who had passed a resolution authorising the trustees to carry on the business for such further period or periods from time to time as the creditors in general meeting shall determine, had as their object "to obtain a profit by carrying on the business during the thirsty season of the year." Cotton, L.J., continues:

> As the Act does not give any power to use the assets in such a speculation, it is our duty to say that the resolutions are *ultra vires*, and that they cannot stand.

James, L.J., at p. 39, having quoted the resolution which I have just mentioned, went on to say that that had the effect of giving themselves

> power to determine from time to time indefinitely how long the business should be carried on.

When the language of the resolution in the present case of Dec. 9, 1937, which I have already referred to, is read, that also appears to be a resolution involving that the committee of inspection will decide from time to time how long the business is to be carried on. It is not to be carried on for such time as would be necessary for the purpose of a beneficial winding up—it is to be carried on for the present. I therefore come to the conclusion that it is impossible to disturb the finding of the judge, that the conduct of the trustee in carrying on this business was contrary to the Bankruptcy Act, 1914, s. 56 (1). A

That being so, it is argued that as a consequence of that, this guarantee cannot be enforced, being, as the judge appears to find, a guarantee based upon an illegal act. I find myself unable to agree with the judge in that conclusion. As I say, I will assume that this business was carried on otherwise than in accordance with the provisions of the Bankruptcy B Act, 1914, s. 56 (1). What is the consequence of that? The legal effects, not of this particular subsection perhaps so much as of the second subsection, have been considered in two cases, one of which turns upon an earlier Act, which seemed to indicate that any objection to the carrying on of the business of the bankrupt, except so far as may be necessary C for the beneficial winding up of the same, could only be taken to be on the basis that the provision for the protection of the estate had been offended against. The actual decision is based upon subsect. (2), or similar words included in the Act of 1883, which are that the trustee must obtain the sanction of the committee of inspection "before bringing D instituting or defending legal proceedings." In *Re Branson* (2), it was decided that those provisions were for the protection of the estate as between the trustee and the estate, and afforded no defence to any proceeding which the trustee, without such sanction, might institute against other parties. A decision similar to *Re Branson* (2) is *Lee* v. E *Sangster* (3). That was a case where, under the Bankruptcy Law Consolidation Act, 1849, s. 153, a party had been summoned, and there was reliance placed upon an earlier Bankruptcy Act, which provided that the assignees could only, with the leave of the court first obtained, upon application to such court but not otherwise, "commence, prosecute F or defend any action at law." WILLIAMS, J., in giving the judgment of the court, said, at p. 6:

> It was contended that the right of the assignees to sue, being a thing created by the Act alone, must be taken with the qualification annexed to it by the Act, namely, that they shall not have the right to sue, unless they shall have obtained G the leave of the Court of Bankruptcy. . . . On consideration, however, we are satisfied that the statute intended to make the obtaining of the requisite leave a matter only between the assignees and the Court of Bankruptcy, and not at all between the assignees and the other party to the suit.

Finally on this head the case to which I have already referred, *Ex p. Emmanuel* (1), appears to me to indicate that it is only upon motion H of the persons interested in the estate that resolutions which offend against sect. 56 (1) (being, as I have said, for the benefit of the estate) can be impeached and held to be invalid. In other words, as against the world, the carrying on of the business by the trustee can create legal relations between him and third parties, either as debtor or creditor, incurred in the carrying on of the business, notwithstanding that it is carried on otherwise than solely for the beneficial winding up of the estate.

The case seems to me to be entirely different from that of a company, which, as a corporation, has power under its articles, memorandum or otherwise, to do certain acts only, purports to make *ultra vires* contracts. The reference to *ultra vires* by COTTON, L.J., in *Ex p. Emmanuel* (1) seems to me only to refer to matters as between persons interested in the disposal of the estate.

In this particular case what has happened is that this guarantee, as I read it, has been given without qualification by the defendant " in consideration of your allowing James to carry on the business of the eating-house." I cannot see why those words, being entirely unqualified, can here be said to constitute a guarantee which is not enforceable, by reason of the mere fact that some creditor might have complained of the continued carrying on of the business. The business was continued to be carried on. The loss contemplated in the guarantee was incurred. All the conditions of the guarantee seem to me to have been satisfied, and the liability to be completed. I do not think it can be said that it is void on any basis of public policy, because the trustee is, in my opinion, competent to carry on the business and create legal liabilities as between himself and persons with whom he carries on business, whether he does or does not do so for the purpose of the beneficial winding up of the estate.

Once that conclusion is arrived at, which, I think, is supported by the authorities, it follows that it cannot be said that this carrying on of the business is illegal in the sense in which the judge has used the word ; nor that it is contrary to public policy. Nor do I think can it be said that there was no consideration moving from the trustee in this matter. It follows, therefore, if the guarantee had not been given and there had been a failure to carry on the business, the defendant would not have achieved her object of keeping James in possession of his eating-house. It follows equally, by reason of this guarantee, that James did go on with his eating-house. There was a chance that the trustee might have made profits by the continued conduct of that eating-house. Consequently, there is consideration supporting this guarantee in both parties. In my opinion the judge was wrong in his conclusion that it was unenforceable ; and I think that there should be judgment on the guarantee against the defendant for £138 15*s.* 3*d.*

MACKINNON, L.J. : I agree. Upon the terms of the written document of Jan. 12, 1938, signed by the defendant and addressed to Clark as trustee in bankruptcy of the estate of William Thomas James, there is no doubt whatever that she was liable for this £138. But it is suggested that Clark cannot enforce that patent liability of the defendant because this agreement is in some way tainted with illegality. It is a guarantee addressed to Clark as trustee of the estate of James, as he was. A trustee of the estate, under sect. 56, may carry on the business of the bankrupt so far as may be necessary for the beneficial winding up of the estate. By sect. 79 it is provided :

> (1) Subject to the provisions of this Act, the trustee shall, in the administration of the property of the bankrupt . . . have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection . . .

On Dec. 31 the committee of inspection decided that this business should be carried on, if the defendant would renew the guarantee she had already given to the Official Receiver. There cannot be the slightest doubt that the committee of inspection thought that was within the powers of Clark as trustee ; and that Clark, as trustee, thought it was within his powers under sect. 56. I think they made a mistake about the law with regard to that. In view of the decision in *Ex p. Emmanuel* (1), if some creditor or some dissatisfied member of the committee of inspection had intervened and had applied to the court saying : " This is not really within sect. 56 ; you are carrying it on indefinitely and not for the purposes of the beneficial winding up of the estate," I think, on the authority of *Ex p. Emmanuel* (1), that the creditor would probably have succeeded.

That means that Clark and the committee of inspection were making a venial, understandable and intelligible mistake as to a very obscure branch of the law ; but there is no turpitude in it, there is no illegality in it. I am at a loss to understand why, because, as between creditors, one of them might object to the carrying on of this business, that should afford the defendant any defence whatever on the plain contract into which she had entered. If authority be needed for that proposition, I think it is supplied by *Re Branson* (2). In both of those cases a person who had contracted with the trustee sought to set up in denial of his liability that there was some irregularity in the action of the trustee in exercising his powers under the Bankruptcy Act. In one case he had not the leave of the court to bring the action, and in the other case the position was somewhat similar. The courts there decided that, as between the trustee and the creditors, it may be that he had acted irregularly, but that does not afford any defence to you who have made a clear contract with the trustee. It seems to me that, if this business having been carried on in this way, a customer who had eaten a pork chop in the restaurant refused to pay, and when sued in the county court, said that he need not pay because Clark was not properly authorised under the Bankruptcy Act, 1914, s. 56, to carry on the business and supply him with the chop, quite clearly the customer would have had no defence. Equally I think the defendant has no defence here to her clear liability upon the terms of the written contract into which she entered. That being so, I agree with my Lord that this appeal should succeed.

du Parcq, L.J.: I do not dissent from the proposed order; but I am bound to say that I entertain much more doubt about the matter than the other members of the court; and I think that I ought to explain briefly why I doubt, and why I do not dissent.

In this case I have no doubt at all that the judge was entitled to find that the trustee in bankruptcy was not carrying on the business of the bankrupt in conditions which justified his carrying it on according to the terms of sect. 56. Sect. 56 (1) empowers the trustee, with the permission of the committee of inspection, to carry on the business of the bankrupt "so far as may be necessary for the beneficial winding up of the same." I agree with what has been said already, that if a creditor had come to the court to object, the resolution passed by the committee of inspection would have been rescinded. It seems to me plain enough that the committee of inspection were really going beyond their authority; and it follows that the trustee in bankruptcy went beyond his authority. As I understand the matter, creditors are not entitled to indulge in the speculation of carrying on the bankrupt's business in the hope that, if they carry it on for some time, waiting perhaps for conditions to improve, it may be possible to carry it on at a profit. Everybody knows that, if you do carry on a business hoping to make a profit, you run the risk of carrying it on at a loss. It was not the policy of the Bankruptcy Act that insolvent businesses of bankrupts should be carried on in an attempt to get them into a more prosperous condition.

I think that *Ex p. Emmanuel* (1) puts the matter plainly, and makes it really beyond question in this case that, to say the least of it, Clark would have had a very great difficulty in justifying to the court what he had done. So far I think we are all agreed; and I feel no doubt about it.

Further, I have no doubt about this. It is very difficult sometimes, as Brett, L.J., said in *Ex p. Emmanuel* (1), to decide in what circumstances the court can say that creditors have exceeded their authority. That, said Brett, L.J., was, to his mind, a very difficult matter. Supposing that the committee of inspection and the trustee act *bona fide*, and think they are carrying on the business in a manner necessary for the beneficial winding-up of the business, I have no doubt at all that, however wrong they may be, they will be liable for any obligations they incur. It would be absurd, and indeed would lead to fantastic consequences, as MacKinnon, L.J., has just pointed out, to say that, if anybody enters into a contract, he must ascertain whether the committee or trustee were right in the view they entertained, that they were carrying on the business within their powers. I think so far as that point goes, that the case of *In re Branson* (2) (to which I need not refer in any detail for the moment) is an authority for saying that the question whether the trustee and the committee of inspection are right or not is one between them and the creditors. Whenever that very difficult question has to be considered, the court must decide it. This court cannot possibly say that obligations entered into by a trustee in bankruptcy, doing what he believes he has power to do, though mistakenly, need not be carried out by him—I put that side of the case because there may well be a case where the whole of the facts would be known to the creditors—or, conversely, that he may not carry out A his obligations to a person who, knowing the facts, became a creditor.

My difficulty arises on the other point which was taken by counsel for the respondent as to the legality of this matter. Suppose, to take facts similar to this in *Re Branson* (2), one would have a case where the trustee in bankruptcy had said: "I am not entitled I know to bring a B legal proceeding relating to the property of the bankrupt unless I get the permission of the committee of inspection, and I know perfectly well that the committee of inspection never would permit it, but if you a third party are prepared to say that if I do bring these proceedings without permission you will indemnify me in respect of the costs, then C I will bring them." I feel grave doubt—I do not put it any higher—as to whether in such a case that contract of indemnity could be enforced, because it would be clear that the consideration, to the knowledge of both parties, was the doing of something which the trustee had certainly no authority, and perhaps no right to do; and which, I think one may D add, it was contrary to the policy of the law that he should do. I do not express any final opinion about that; but I feel a great doubt whether in such a case the indemnity could be enforced.

When one considers the facts of the present case, I am strongly inclined to think that they establish clearly that the trustee in bankruptcy and E his committee knew quite well that what they were doing in carrying on the business of the bankrupt was not necessarily being done for the beneficial winding up of the same when they agreed to do it. Speaking of the trustee in bankruptcy, I think that, if the trustee in bankruptcy agreed to do it for a consideration, then that contract could not be enforced. F I say that because it does seem to me to be clear enough that, although no doubt in a sense it is a domestic matter between the creditors and the trustee in bankruptcy, still the plain policy of the Act is that these insolvent businesses should not be carried on. If a man knows that he has no power to do something that he is doing, something which he G is not permitted to so, something which I think I may say he is forbidden by law to do, and does it for a consideration, then that consideration may well be said to be an illegal consideration.

In this case the judge came to the conclusion, as I understand his judgment, that the trustee in bankruptcy was, as he puts it, intervening H in the business not for the beneficial winding up of the same, but for another purpose altogether. The judge says:

> He was involved with Mrs. Smith [that is the defendant] who came and told him over and over again that the only purpose of her guarantee was that James should be able to go on in that business, not that the estate should benefit, not that there should be a beneficial winding up of the estate. £200 was offered and

> the trustee in bankruptcy could have accepted it. Instead of that, I find upon the evidence that, at the behest of the defendant, he was in fact influenced and biased in the action which he took in carrying on this business by, as he has sworn to me, his desire to help James in his difficulties.

It is quite true, of course, that on the face of it, this guarantee is a perfectly lawful document: but there is, I think, no doubt at all that an agreement, which is on the face of it perfectly legal in its terms, will be void if it is made for an illegal purpose. If I were completely satisfied that there was really no doubt that the purpose for which this guarantee was given was an illegal purpose, then I should dissent and say that I thought the appeal ought to be dismissed. That is a point about which I have felt considerable doubt. I think the carrying on of the business merely to make a profit, coupled with a desire to oblige the defendant or James, probably would be—it is not necessary that I should in these circumstances express a final opinion—an illegal purpose. I am impressed by the findings of the judge: but it is a serious thing and a strong thing to say that people who may have been doing what they thought right, and may have been honestly endeavouring to carry out the Act, have been guilty of illegality; and I am necessarily impressed by the strong view taken by MacKinnon, L.J., that there is nothing at all here to show that these people were not honestly trying to carry out the terms of the section. It may be that they misinterpreted it, and misunderstood their duties. It may be possible that they thought the best thing they could do for the beneficial winding up of the estate was to carry on the business a little longer. I am not prepared to say that they are not entitled in those circumstances to take into account the fact that a guarantee had been given against loss. In other words, there is a clear distinction between saying: "You are doing something which you ought not to do, because you have a guarantee," and, on the other hand, saying: "It may be a doubtful and delicate question whether this is the best thing to do, but the guarantee thrown into the scale just tilts it in favour of thinking it is the right thing to do for the beneficial winding up of the estate."

Having those doubts and reservations in my mind, which I have thought it proper to express, for the reasons I have given I do not dissent; and I am prepared to agree that the appeal should be allowed.

Appeal allowed with costs. Leave to enforce judgment given under the Courts (Emergency Powers) Act, 1939, *s.* 1.

Solicitors: *Lovell, Son & Pitfield*, agents for *F. J. P. Veale*, Brighton (for the appellant); *Gordon Gardiner, Carpenter & Co.*, agents for *F. H. Carpenter*, Brighton (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

CRANE *v.* HEGEMAN-HARRIS CO., INC.

[Court of Appeal (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **October 4, 5, 1939.]**

Mistake—Rectification—Agreement containing arbitration clause—Parties proceeding to arbitration and award made—Claim for rectification of agreement in action to enforce award—Estoppel.

By a building agreement dated July 16, 1935, the defendants agreed to construct for the E.C. Co., Ltd., the E.C. exhibition buildings. The contract price was to be divided into two clear parts—namely, (*a*) the actual cost of labour and materials, and (*b*) a fixed sum of £140,000, which was to cover and include the defendants' profit, the cost and expenses of plans, specifications and architectural drawings, the salaries of architect and engineer, and general overhead expenses. It was also provided that the total liability of the E.C. Co., Ltd., should not exceed £1,209,250, and that, should the total cost exceed that amount, the defendants should assume responsibility for, and pay for, any such excess, called the over-run. It was agreed that the sum of £140,000 should be divided into two equal parts, and that the first £70,000 should represent the defendants' expenses and the second £70,000 the job profit, subject, however, to the over-run. By an agreement, dated Oct. 23, 1935, made between the plaintiff and the defendants, and expressed to be supplemental to the building agreement of July 16, 1935, the plaintiff was to be the architect for the job, and was to be paid a minimum fee of £13,000, and " such a further amount (not exceeding £20,000 in all) as shall be equal to two equal seventh parts of the amount which the company shall under the terms of the building agreement " receive and retain " in respect of the fixed fee of £140,000 payable thereunder to the company." No sum under this provision was to be payable to the architect until the company, the defendants, had " received and retained £70,000 on account of the fixed fee payable to them but as and when any sum in excess of £70,000 shall be received and retained by the company in respect of the fixed fee the company shall pay over to the architect an amount equal to two equal seventh parts thereof." A dispute arose over the meaning of the words " and retain," the defendants contending that it had been part of the bargain between the parties that from the £70,000 in respect of which the plaintiff was to get his two-sevenths there must first be deducted any sum which the defendants had to pay by way of over-run. On a submission to arbitration being made, the arbitrator decided against the construction contended for by the defendants. The plaintiff brought an action to enforce the arbitrator's award, and the defendants then contended that the submission was no real submission, because it was based upon a fundamental mistake of fact and did not express the real agreement between the parties. They also counterclaimed for rectification of the agreement. The plaintiff contended that the defendants were not entitled to put forward the plea after a submission to an arbitration in which an award had been made :—

Held : (i) the claim for rectification was outside the actual submission that was before the arbitrator and the question could not have been raised before him without some further agreement by both parties.

(ii) the respondents were not estopped from raising the issue of rectification by reason of their having proceeded with the issue before the arbitrator until its conclusion as rectification of the agreement was an issue outside the jurisdiction of the arbitrator.

Decision of Simonds, J. ([1939] 1 All E.R. 662) *affirmed.*

[**EDITORIAL NOTE.** The point here is quite a short one, such complication as there is being purely one of the facts. The point is whether, in an action to enforce the award of an arbitrator, the defendants can ask for the rectification of the contract containing the arbitration clause. The matter not being covered by authority, the plaintiff, in answer to such a claim, pleaded estoppel, but it is held that the award is not, in this respect, in the same position as that of a judgment of the court, and that the defendants were, therefore, not too late in their claim for rectification. Assuming a proper case for rectification, it follows that the agreement submitted to the arbitrator was not the agreement of the parties, and since an action to enforce an award is essentially an action to enforce the agreement, it is only right that, in that action, a claim for rectification of the agreement should be allowed.

AS TO TIME FOR RECTIFICATION, see HALSBURY, Hailsham Edn., Vol. 23, p. 160, para. 232 ; and FOR CASES, see DIGEST, Vol. 35, pp. 142-144, Nos. 408-419.]

Case referred to :

(1) *Printing Machinery Co., Ltd.* v. *Linotype & Machinery, Ltd.* [1912] 1 Ch. 566 ; 2 Digest 373, 385 ; 81 L.J.Ch. 422 ; 106 L.T. 743.

APPEAL from a judgment of SIMONDS, J., dated Feb. 9, 1939, reported [1939] 1 All E.R. 662, in an action to enforce an award made by an arbitrator upon a submission to arbitration.

Philip Vos, K.C. and *E. J. Rimmer* for the appellant.

H. U. Willink, K.C., and *Eustace W. Roskill* (for *John Megaw*, serving with H.M. forces) for the respondents.

Vos, K.C.: It was not until the appellant sought to enforce the award that the respondents set up the defence that the written agreement did not state the true agreement made between the parties. The point was not taken before the arbitrator nor before either the Divisional Court or the Court of Appeal. The conduct of the respondents amounts to an estoppel. The respondents knew what the Divisional Court and the Court of Appeal said and the appellant continued to incur expense in seeking to enforce the award.

Counsel for the respondents were not called upon.

SIR WILFRID GREENE, M.R.: In the action out of which this appeal arises, the appellant was seeking to enforce an award of an arbitrator in his favour. The respondents were resisting that claim and themselves counterclaiming in the action for rectification of the agreement between the parties out of which the claim arose, and under which the reference to the arbitrator had taken place.

The appellant was employed as an architect by the respondents in connection with works at Earls Court which the respondents had contracted to carry out on behalf of a company called Earls Court Limited. Under the agreement between those two parties, which I need not refer to in detail, the substance of the matter was that the respondents were to manage and supervise the whole of the work and be responsible for its execution, but the actual work itself was to be done by sub-contractors. The remuneration of the respondents under that agreement, which is dated July 16, 1935, was to be obtained by payment by the building owners of a fixed fee of £140,000 which was to cover the respondents expenses as contractors including architectural expenses and their profit.

There is only one other clause which I need refer to, and that is article 11, under which the respondents guaranteed the maximum cost for the work at a figure of £1,209,250 which was inclusive of the £140,000 payable to them as I have mentioned. The clause contained an undertaking by the contractors to bear any excess over that figure and they were to have no claim against the building owners in respect of any such excess. The amount by which that figure might be exceeded has been referred to in the course of these proceedings as the over-run and it is in connection with that over-run that the substance of the present dispute arises. The agreement between the appellant and the respondents was made after he, the appellant, had been working for some time as an architect in connection with these works, and it is dated Oct. 23, 1935. It was expressed to be supplemental to the building agreement, and the only matter which I need refer to in it (I do not propose to read any part of it at length) is the provision for remuneration. In short, the appellant was to be entitled to a minimum fee of £13,000, and that he got and kept in any event whatever his own expenses might be. He was also to be entitled to a further amount not exceeding £20,000 equal to 2/7ths of the amount which the respondents should under the terms of the building agreement receive and retain in respect of the fixed fee of £140,000. But the appellant was not to receive anything under that provision until the respondents had received £70,000 on account of the fee. It was only when a sum in excess of that was received and retained by the company that the appellant was to be entitled to receive his 2/7ths.

The appellant claimed that when sums in respect of that £140,000 were received by the respondents he was entitled to his percentage without reference to the possibility that, by the operation of the clause relating to over-run, the respondents might be called upon to sacrifice what would otherwise have been part of their profit in order to implement the guarantee under the over-run clause. The respondents claimed that they were entitled to await the final settlement of the account and to await the operation of the over-run clause should it actually in the future come into operation. As the result of the dispute which so arose as to the meaning of the remuneration clause in the agreement between the parties an arbitration took place pursuant to an arbitration clause in the contract, or I should say, in purported pursuance of that clause. For the purpose of getting the arbitration on foot, the parties entered into a submission agreement dated Apr. 19, 1937, which recited that questions or differences have arisen and are now pending between the parties hereto touching the construction of the agreement and touching also the rights, duties and liabilities of the respective parties thereunder within the meaning of cl. 4 of the agreement. It recites an agreement to refer the said matter to arbitration, and then in the operative part it was agreed:

> That all such disputes questions and matters of difference between the parties hereto and all other matters in difference between the parties arising out of or relating to the said agreement or the subject matter thereof or as to the rights

duties or liabilities of either of the parties in connection with the premises are hereby referred to the award and final determination of Mr. Roland Oliver.

The arbitration proceeded and at the outset the arbitrator was confronted with what was the dispute between the parties at that time, a dispute as to the true meaning and effect of the remuneration clause contained in the agreement and he stated a consultative case which wended its way to the Divisional Court and finally, to this court, and, as a result of those proceedings, it was held that the contention of the present appellant on the matter of construction was correct. That decision, of course, is binding upon us but the feeling of difficulty which one at any rate of the judges had in having the matter put before him without the surrounding circumstances being ascertained has, I think, not been without justification in the result, but, of course, that decision is binding and cannot be questioned, and it is the basis of what afterwards took place.

The matter went back to the arbitrator and he made an award based upon that decision of this court on the consultative case. When the appellant sought to enforce that award in a summary manner the respondents raised, and raised for the first time, a claim that the agreement did not embody the true intention of the parties common to both of them and ought to be rectified. This court on that claim being set up refused to allow the award to be enforced in a summary manner and the present proceedings were thereupon instituted by writ.

Two arguments on behalf of the present appellant were before SIMONDS, J., and these arguments are before us. They were these. First, that upon the facts of the case no case for rectification had been made out: secondly, that the matter in question, namely, the issue between the parties as to whether or not the agreement ought to be rectified was a matter which fell within the terms of the arbitration submission, which could have been raised before the arbitrator, and ought to have been raised before him, and could not be raised after he had issued his award and was *functus officio*. There was a further argument based on some sort of estoppel, or to use Mr. Vos's word in his argument in the present appeal, quiescence. SIMONDS, J., in a judgment of conspicuous clarity, rejected the appellant's argument on both points. He found that the facts brought to his mind that high degree of conviction which unquestionably is to be insisted upon in rectification cases. The other matter which was argued before SIMONDS, J., and was also argued before us, relates to the terms of the submission agreement. It was said by Mr. Vos that it was open to the respondents, under the terms of this submission, to raise the question of rectification before the arbitrator and that had they done so the arbitrator would have been entitled, and bound, to deal with that issue and that accordingly it is not competent to the court afterwards to listen to a case which falls within the terms of the submission. It is sufficient in answer to that argument to say that, in my opinion, it is based upon a misconstruction of the terms of the submission itself. The submission relates to disputes which had arisen at its date with regard to a particular written document specified and identified in it, and the jurisdiction of the arbitrator under that submission was, in my opinion, confined to whatever matters relating to that document as an agreement between the parties fell within the description in the submission.

The issue raised by the claim for rectification is an issue of a totally different description. It is an issue of fact which does not arise out of the particular written agreement in question, but which seeks to substitute for that particular document another agreement in terms different from those set out in the written document. Once that fact is appreciated, it appears to me to be clear, beyond argument, that any attempt by the respondents in the proceedings before the learned arbitrator to raise the issue of rectification could not have been successful without some further agreement by both parties to submit that particular matter of dispute, which lay outside the actual submission that was before him. That conclusion appears to me to follow quite clearly from the clear language of the submission itself, but I am fortified in the view that I take and the reasons adopted when I find that Warrington, J., as he then was, in the case of the *Printing Machinery Co., Ltd.* v. *The Linotype & Machinery, Ltd.* (1), adopted similar reasoning in a case before him. I do not propose to read the passage which begins at the bottom of p. 572 but it is based upon the view that the references in the submission there to the agreement and so forth were references to the particular written document unrectified, and not to a different document which might result from a successful claim for rectification.

The only other point is the point that I have before mentioned, a suggestion that there was some sort of estoppel or quiescence by the respondents which deprives them of the right at this stage to raise the point. Mr. Vos contended that a party in circumstances such as these was not entitled to take two bites at a cherry. I think it is sufficient to say that nobody in the wildest flight of metaphor would say that a person was bound to take one bite at two cherries. The issue of rectification is a totally different issue. The only issue before the arbitrator related to the actual document, and there was nothing in the world to prevent the respondents from proceeding with that issue which was submitted until its conclusion, and then to raise a different issue altogether which was entirely outside the jurisdiction of the arbitrator. The case is no doubt one of importance to the parties and for that reason I have thought proper to put in my own language my reasons for saying that this appeal should be dismissed, but I might have been content to say that the judgment of Simonds, J., both on law and on fact, is one with which I am in entire agreement. The result is that the appeal must be dismissed with costs.

Clauson, L.J.: Taking as I do precisely the same view as that which has been expressed by the Master of the Rolls, I find it unnecessary to add anything. I agree.

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *William Charles Crocker* (for the appellant); *Slaughter & May* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

RUSHBROOK *v.* RUSHBROOK (BY HER GUARDIAN).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **October 11, 1939.**]

Divorce—Desertion—Supervening insanity of deserting respondent—Animus deserendi of certified lunatic—Presumption—Matrimonial Causes Act, 1937 (c. 57), s. 2.

The husband petitioner for divorce relied upon the desertion of the respondent without cause for at least three years immediately preceding the presentation of the petition. On Jan. 21, 1931, the respondent deserted her husband without cause, and on Mar. 7, 1937, just more than a year before the presentation of the petition, she was certified as a lunatic, and she so remained until the presentation of the petition. Her condition deteriorated in Aug., 1938, and at the time of the hearing she was still certified and with little hope of recovery. It was contended that evidence could be given to show that during the period of certified lunacy the respondent was able to exercise such a rational judgment upon the question of her relations with her husband as to complete a continuous *animus deserendi* over the necessary period, her separation and desertion at the outset being proved. For the respondent it was contended that, in the case of a certified lunatic, the presumption of incapacity to form or to have an *animus deserendi* was irrebuttable, and that the statutory period of desertion of necessity ceased to run at certification:—

HELD: it is not possible to draw an inference as to the *animus* of a person certified as a lunatic, and therefore no *animus deserendi* can be found to exist after certification, and the necessary period of desertion was not proved.

[**EDITORIAL NOTE.** This case discusses the question whether the presumption that an insane spouse can form no intention to desert is a rebuttable or an irrebuttable one. It seems that in so far as *Bennett* v. *Bennett* (2) may be thought to decide the contrary it is overruled by *Williams* v. *Williams* (1). The position, however, is not altogether clear, having regard to the judgment of MACKINNON, L.J., in *Williams* v. *Williams* (1).

AS TO DIVORCE ON THE GROUND OF DESERTION, see HALSBURY, Supp., Divorce, para. 971; and FOR CASES, see DIGEST, Vol. 27, p. 319, Nos. 2974-2977.]

Cases referred to:

(1) *Williams* v. *Williams*, [1939] 3 All E.R. 825; Digest Supp.; 161 L.T. 202.

(2) *Bennett* v. *Bennett*, [1939] P. 274; [1939] 2 All E.R. 387; Digest Supp.; 161 L.T. 96.

PETITION by husband for divorce on the ground of desertion. The relevant facts are fully stated in the judgment, and the case is only reported on the divergence of views expressed in the decided cases.

R. J. A. Temple for the petitioner.

E. Holroyd Pearce for the respondent.

Langton, J.: This is not an easy case, and, from the petitioner's A
point of view, it is a hard case, but, in my view, both on the aspect of the facts and the law the case is reasonably clear. The important dates in the matter are first, that the parties were married on Aug. 4, 1930; secondly, that on Jan. 21, 1931, the respondent undoubtedly deserted her husband without cause; and thirdly, that on Mar. 7, 1937, a period B
of just more than a year before the presentation of this petition on Apr. 20, 1938, the respondent was certified as a lunatic. During the whole of that succeeding year until the presentation of the petition she remained a certified lunatic, and in Aug., 1938, her condition, which up to that time was described by the doctor as an ascertainable condition C
of *dementia præcox*, the form of lunacy being the schizophrenic type, took a considerable turn for the worse, and the respondent to-day is still a certified lunatic, and it now appears that there is little hope of recovery.

The case as presented by counsel for the petitioner was that, in spite D
of the fact that the respondent had been, during the period of 13 months of the period prescribed by the Act as the last three years before the petition was presented, a certified lunatic, there was ground for argument that she was, during that period, able to exercise a sufficiently rational judgment upon the question of her relations with her husband E
to enable me to infer that she had a continuing *animus deserendi*. This question of the position of lunatics *vis-à-vis* desertion has lately received considerable illumination from the judgment of the Court of Appeal in *Williams* v. *Williams* (1). Epitomising the judgment of Sir Wilfrid Greene, M.R., he says in terms that the act of desertion requires two F
elements on the side of the deserting spouse—namely, the factum of separation and the *animus deserendi*—and on the side of the deserted spouse one element—namely, the absence of consent.

In this case there is no doubt at all about the factum of separation, and the factum of desertion is amply established by the G
petitioner's witness. The wife did desert the husband on Jan. 21, 1931. It becomes then a question whether this *animus deserendi* can be said to have been continuing over the necessary period—namely, the last three years before the presentation of the petition in April, 1938. I have had, on behalf of the petitioner, some very careful, and, I think, H
very fair evidence from the doctor in charge of the institution where the respondent was for a very considerable period. She is not under his charge now, but during the material period—namely, from Mar., 1937, until Apr., 1938—she was continuously under the charge of Dr. Banbury, the medical superintendent at the Ipswich Mental Hospital.

In law, the matter as left by the Court of Appeal in *Williams* v. *Williams* (1) seems to me to stand in this way. Where a person is proved to be a lunatic accepted in law by certification as a lunatic, it is, in the words of SIR WILFRID GREENE, M.R., impossible to make any inference at all that the lunatic is capable of having the *animus deserendi.*
A Counsel for the respondent has argued that that is not the meaning of the judgment in *Williams* v. *Williams* (1) in the Court of Appeal, and has argued that the passage in the judgment of BUCKNILL, J., in *Bennett* v. *Bennett* (2), at p. 280, is the proper and still standing statement of the law on this subject—namely, that these are cases in which
B there is a rebuttable presumption. The rebuttable presumption is that, if a person is a lunatic, he is incapable of forming a rational judgment on this question, but, if medical evidence establishes that, in spite of his acknowledged weakness, it is possible for any individual lunatic to form a judgment upon this matter, that evidence can be admitted.

C This decision of BUCKNILL, J., was before the Court of Appeal and considered by them before their judgment was delivered in *Williams* v. *Williams* (1), and, although the case is mentioned on more than one occasion in the judgment which fell from MACKINNON, L.J., I do not understand any of the judgments of the Court of Appeal to accept the
D principle laid down by BUCKNILL, J. It is true that in that case BUCKNILL, J., decided as a matter of fact that the presumption was not rebuttable, and, therefore, there was no reason why the Court of Appeal should desire to overrule a judgment with which they no doubt would agree, but I do not understand myself that they left this matter, where
E a person is once an accepted, certified lunatic, as being open to argument at all. I read the judgment of SIR WILFRID GREENE, M.R., as meaning that it is not possible to make any inferences at all concerning people who are certified lunatics, and upon that ruling it seems to me that this case is unarguable; and the first thing I have to say about it is that it
F is established in law that this unfortunate woman was a certified lunatic during at least one year of the necessary time, and that being so there is no more to be said about it than that in law it is impossible to argue that she was capable of any *animus deserendi*, and it is impossible, therefore, that the petitioner should succeed.

G [His Lordship then dealt with the facts and decided against the petitioner.] For the reasons I have stated, I do not think that the proper reading of the judgment of the Court of Appeal in *Williams* v. *Williams* (1) allows such questions of fact to be entered into at all; but, if it does, I still cannot help the petitioner.

H *Petition dismissed.*

Solicitors: *Worthington Evans, Dauney & Co.* (for the appellant); *The Official Solicitor* (for the respondent).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

STOVELL *v.* JAMESON.

[King's Bench Division (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **October 12, 13, 1939.**]

Gaming—Betting—Football pool—Premises used to "effect" betting transactions—Meaning of "effect"—Coupons accepted at premises other than those of respondent—Betting and Lotteries Act, 1934 (*c.* 58), *s.* 3 (2).

The respondent, who was a tobacconist in Croydon, acted as collector for a firm of football pool promoters carrying on business in Edinburgh. Persons desirous of placing bets with the promoters came to the respondent's shop where they handed him the completed coupons which were forwarded by him to the promoters in Edinburgh. The promoters were at liberty either to reject or to accept bets so forwarded by the respondent. The information against the respondent having been dismissed by the justices, it was contended on behalf of the appellant, an inspector of police, that the bets had been "effected" at the respondent's premises. On behalf of the respondent it was contended that the bets had been "effected" in Edinburgh and not in Croydon where the respondent's premises were situate:—

Held: the bets had been "effected" at the respondent's premises within the meaning of the Betting and Lotteries Act, 1934, s. 3 (2), and in order to constitute an offence under that section it was not necessary for the transaction to have been actually completed at the respondent's premises.

[EDITORIAL NOTE. It is a common practice for the promoters of football pools to allow tradesmen to supply coupons, and receive completed coupons and payments for previous entries. It was contended that, as the coupons might be rejected by the promoters, the transaction was not effected at the tradesmen's premises, but this argument is rejected, and a tradesman so acting commits an offence under the Betting and Lotteries Act, 1934, s. 3 (2).

As to Football Betting, see HALSBURY, Hailsham Edn., Vol. 15, pp. 509, 510, para. 916; and for Cases, see DIGEST, Vol. 25, pp. 463, 464, Nos. 496-501.]

Cases referred to:

(1) *Stoddart* v. *Hawke*, [1902] 1 K.B. 353; 25 Digest 447, *403*; 71 L.J.K.B. 133; 85 L.T. 687.

(2) *Lennox* v. *Stoddart, Davis* v. *Stoddart*, [1902] 2 K.B. 21; 25 Digest 407, *108*; 71 L.J.K.B. 747; 87 L.T. 283.

(3) *Dunning* v. *Swetman*, [1909] 1 K.B. 774; 25 Digest 434, *318*; 78 L.J.K.B. 359; 100 L.T. 604.

(4) *Samuel* v. *Adelaide Club, Ltd.*, [1934] 2 K.B. 69; Digest Supp.; 103 L.J.K.B. 561; 151 L.T. 116.

(5) *Milne* v. *The Commissioner of Police*, [1939] 3 All E.R. 399; Digest Supp.

Appeal by way of case stated from the decision of the Croydon Borough Petty Sessional Court dismissing an information against the respondent under the Betting and Lotteries Act, 1934, s. 3 (2). The facts and arguments are fully stated in the judgment.

G. B. McClure for the appellant.

Gilbert Beyfus, K.C., and *D. Grant* (acting for *John C. Maude*, serving with H.M. forces) for the respondent.

Lord Hewart, L.C.J.: The respondent, it appears, was at all relevant times a tobacconist carrying on business in Croydon; and in September of last year he was appointed a collector for an organisation or institution called Strang's Pools. On various days in October of last year persons resorted to that tobacconist's shop for the purpose of obtaining football pool coupons, which Strang had supplied to the tobacconist. On certain days also in October and November last, persons resorted to the premises for the purpose of handing to the respondent completed Strang's Football Pool coupons and money owing to Strang on the previous week's coupons, in order that the respondent might despatch by post the completed coupons and the money to Mr. Strang's offices, which happen to be not in Croydon but in Edinburgh. Having received the coupons and the money, the tobacconist sent on both by post to Mr. Strang in Edinburgh, having in the meantime taken the precaution of deducting commission at the rate of 5*s.* in the pound on some pools and at 3*s.* in the pound on others. Those coupons were connected with entry forms which contain a series of conditions. To those conditions, or what are regarded as the most material of them, counsel for the respondent has directed our attention. Upon those conditions, as the case finds, and as the conditions assert, Mr. Strang might receive and accept or, on the other hand, might reject the coupons as entries. Finally, it is found as a fact that persons other than defaulters were notified or caused to be notified by Strang in the event of their coupons not being accepted. The coupons of defaulters, that is to say, persons who had not paid up, were treated as automatically rejected.

The first rule indorsed on these coupons provides that the coupon

> is an entry form containing the conditions on which it may be completed and submitted to me [Strang] and on which alone I am prepared to receive and, if I think fit, to accept it as an entry.

Then there is a rule, No. 7, whereby clients and collectors are debarred from calling at his premises; and it is provided that business must be done by post only; the coupon must be sent in a sealed envelope duly stamped, "and must arrive here" at a certain time in relation to the playing of the matches. Then there is a condition, No. 9, about payments from clients and in particular

> payment of stake to anyone on my behalf will not be regarded as payment to me,

The payer takes the risk of the payment reaching him at its proper time. Finally, there is a long series of disqualifications.

In that state of facts, it was contended for the appellant that in the vocabulary which the legislature has used, pool betting transactions were effected by the respondent. It was contended for the respondent that no pool betting transactions were effected at the respondent's premises, but that the betting transactions were effected in Edinburgh, if and when such coupons were accepted by Strang; and the justices upon the evidence and the law came to the conclusion that the offence charged had not been committed.

In the course of this discussion we have had an interesting resumé of part, at least, of the voluminous law relating to the topic of betting. We have listened with interested attention to the arguments of counsel on each side. I cannot help thinking, as the conclusion of the whole matter, that the point is, I do not say a point of no parts and no magnitude as some points are, but is, if I may again repeat the almost A sacramental phrase, within a very narrow compass. The Betting and Lotteries Act, 1934, s. 3 (2) provides as follows :

> Save as is permitted by the preceding sub-section, no person shall use any premises whether situate on a track or not . . . as a place where persons resorting thereto may effect pari mutuel or pool betting transactions. B

Every art and every science, presumably, is entitled, or more or less entitled, to some vocabulary of its own, and the vocabulary of the legislature in this case is the expression "may effect pool betting transactions." The mischief of it is a place where persons resorting thereto may effect betting transactions, or, in plain and simple English, C may bet.

What is meant by this expression "may effect betting transactions" ? There is no magic about the word "pool." There is no magic about the interpolation of words about "pari mutuel" ; it is : "may effect betting transactions." Of course, before this Act of 1934 was enacted, D many Acts had been passed and much had been written and said on the topic of betting. In particular, to mention only three out of the labyrinth of cases more or less relevant and material, in 1902 in *Stoddart* v. *Hawke* (1) at p. 359, LORD ALVERSTONE, L.C.J., had spoken of that which was done in that case as being "an essential part of the system." E In like manner VAUGHAN WILLIAMS, L.J., in *Lennox* v. *Stoddart* (2), at p. 33, spoke of "a material and necessary step for the purpose of the receipt of the money" ; and not to multiply citations, in *Dunning* v. *Swetman* (3), at p. 774, LORD ALVERSTONE, L.C.J., spoke of doing "that which was a substantial part of the business of betting." F

The argument of counsel for the respondent really turns upon this. He says there are, or may be, all kinds of tentative steps in the prolonged task of effecting a betting transaction, and it is not true to say that the betting transaction is effected unless and until it is in every respect and to all intents and purposes completed. He has used various words, G to each of which I suppose a meaning is to be applied : "till the transactions are brought about," "accomplished," "concluded" and "completed." All those things, he says, are to be found latent in this word "effected," or, to vary the metaphor, the building is not completed until the coping stone, as Walter Besant said, was put upon it. I cannot H think that that is the fair meaning of this subsection, whether one looks at it by itself, or looks at it in relation to all that had gone before. Of course, the draftsman had to use some verb if he were going to use a word like "transactions," and perhaps an obvious verb was "effect," but what does this expression "may effect pool betting transactions"

mean ? Does it mean, carry out the process of making the transaction
to the last possible step, so that it is a complete, rounded, accomplished
whole ? I do not think the mind of the legislature was directed to
any such point. The mischief was, places where persons resorting
thereto might come and bet, or make bets, and I think it is only another
A way of saying what had been said again and again in various antecedent
cases, " where a substantial part of the business of betting is done,"
" where an essential part of the system is carried out," " where a material
and necessary step for the purpose is completed."

Here, not to repeat these rules, it is quite obvious that subject to
B certain exceptions, as in the case of a defaulter or in the case of an
infant, the moneys paid to the tobacconist were automatically received
and passed on to Edinburgh. This was a mere apparatus for the collection
of moneys to be paid for the purposes of betting ; and I think it is really
artificial and fantastic, with all due respect to counsel for the respondent,
C to seek to extract out of these words, " may effect betting transactions,"
something more comprehensive on the one hand, more detailed on the
other hand, than one would gain from the use of an ordinary simple
verb.

In a part of his argument, counsel for the respondent laid great stress
D on the word " where " in sect. 3 (2) " as a place where persons resorting
thereto may effect," etc. Let it be conceded that it is as if the word
had been written " as a place in which," or " as a place within the four
walls of which persons resorting thereto may effect transactions." That
does not increase or diminish any difficulty there may be. The important
E words, in my opinion, are the words " may effect betting transactions."
What do they mean, and is it true to say that a betting transaction is
not, within the meaning of this section, effected unless and until every
step is completed and the bet which is offered has been formally and
authoritatively received ? In my opinion, the plain meaning of these
F words is different from that, and the offence is committed, the mischief
arises, if that which is done is a substantial part of the business of betting.
I think, therefore, that these justices came to a wrong conclusion in
point of law, and that this appeal ought to be allowed, and the case
go back to the justices with a direction that the offence which was charged
G was proved.

CHARLES, J. : I agree and I have very little to add. This sect. 3 (2)
contains the words " may effect pool betting transactions." It is urged
upon us that that is not the same as betting, but that the true meaning
H of those words is that every single thing connected with the bet shall
be completed and ended. It is very difficult to understand why effecting
a betting transaction should be regarded as meaning anything other
than betting. The words are different, but I cannot see anything in
the words to justify the conclusion we are asked to draw, that those
words were put into that section to distinguish it from betting, to

elucidate the word "betting," and to introduce a meaning which case law has found the word "betting" did not comprise. It is quite clear that, unless counsel for the respondent can induce us to suppose that to effect a betting transaction was not to make a completed bet there and then, his case really fails, because a long chain of authority on the word "betting" shows that, as was contended in *Samuel* A
v. *Adelaide Club, Ltd.* (4), which was approved in *Milne* v. *The Commissioner of Police* (5)—I quote from the judgment of ATKINSON, J., at p. 74:

> the club room is not being used and cannot be used for the purpose of betting unless the contract involved in a bet is actually made in the room, and that in law the contract is made where the bookmaker receives and accepts the offer—namely, in his own office. Now the section does not say [this is under the old Act of 1853] that the B
> place shall not be used by the forbidden person, but that it shall not be used for the purpose of the forbidden person betting with persons resorting thereto.

ATKINSON, J., narrows it down, so as to make the matter almost an absurdity, by supposing that there were adjoining houses and the bookmaker was in one house and his agent was in the other, doing everything C
or a substantial part of it in house A. and the actual betting transaction completed and finished in house B.; and he indicates that the evil aimed at by the section is precisely the same, as if he were present in person with the backers, although he is in house B. It seems to me, I say again, to be straining the interpretation of that section to say D
that to effect betting transactions means, as ATKINSON, J., said in the *Adelaide Club* case (4), that the betting must be a completed transaction in one and the same room to which the person was resorting. I do not think it means anything like it. It is quite clear that a substantial part of this betting transaction did take place in this tobacconist's shop. E
I think the magistrates were wrong in their decision, as my Lord has said.

HUMPHREYS, J.: I am of the same opinion. We are called upon to construe the Betting and Lotteries Act, 1934, s. 3. In my view, the most important words for that purpose are the first words of the section, which indicate what it is that it prohibits. The section enacts F
that no pool betting business shall be carried on except on an approved horse racecourse or on a licensed dog racecourse, and then continues:

> save as is permitted by the preceding subsection, no person shall use any premises . . . as a place where persons resorting thereto may effect . . . betting transactions.

I cannot myself doubt that those words—"may effect betting trans- G
actions"—have no wider or different meaning than saying that no person may use his premises for the purpose of the betting business, the prohibition of which is to be found in that section. I entirely agree with what has been said by the other members of the court, and that the case should be remitted. H

Appeal allowed with costs. Case remitted to justices with direction that the offence charged was proved.

Solicitors: *The Solicitor, Metropolitan Police* (for the appellant); *Vardon & Corfield* (for the respondent).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN COMPAGNIE PRIMERA DE NAVAGAZIONA DE PANAMA AND COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A. THE YOLANDA.

[COURT OF APPEAL (Slesser, MacKinnon and du Parcq, L.JJ.), **October 12, 13, 1939.**]

Shipping—Charterparty—Charterparty to remain in force for two consecutive voyages—Deviation in first voyage—Whether charterers bound to make second voyage.

By a charterparty dated Dec. 30, 1937, the Yolanda was chartered to go to Istanbul and from there, as ordered, to proceed to Constantza, or to a safe port in the Black Sea, and there to load oil in bulk and take it to a Mediterranean port between Cartagena and Barcelona, inclusive. The vessel was at liberty to call at any ports in any order, to tow and assist vessels in distress, to deviate for the purpose of saving life, and to call at any port or ports for bunker supplies. The charterparty was to remain in force for two consecutive voyages upon the same terms and conditions. The Yolanda loaded oil at Constantza for Valencia. On leaving Constantza, the captain set his course for Zonguldak, which is about 150 miles east of the Bosphorus, and is not a port on the ordinary route from Constantza through the Bosphorus. Later, owing to weather conditions, he altered his course, and went to Istanbul. From Istanbul, he sailed for Algiers, but put into Bona, a North African port, about 30 miles off his course, when he still had sufficient bunkers to reach Algiers. It was contended that these were deviations under the charterparty, and that the charterers were entitled to refuse to implement the contract with regard to the second voyage:—

HELD: the deviation in the first voyage relieved the charterers of the performance of the charterparty and of the necessity for giving orders for the second voyage, as the contract was an entire contract for the two voyages.

Decision of BRANSON, J. ([1939] 2 All E.R. 240) *reversed.*

[**EDITORIAL NOTE.** The point here is the short one, whether the deviation during the first voyage entitled the charterers to repudiate the contract in respect of the second voyage, the charterparty providing for two consecutive voyages. This is a matter not covered by previous authority, and it is decided that the contract for the two voyages is an entire one and, therefore, the provisions relating to the second voyage fall with those for the first. The matter, however, is treated as one of the construction of the particular document.

AS TO EFFECT OF DEVIATION, see HALSBURY, Hailsham Edn., Vol. 30, pp. 293-297, paras. 487-489; and FOR CASES, see DIGEST, Vol. 41, pp. 487-490, Nos. 3182-3195.]

Cases referred to:

(1) *Hain S.S. Co., Ltd.* v. *Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597; Digest Supp.; 155 L.T. 177.

(2) *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 12 Digest 339, *2835*; 53 L.J.Q.B. 497; 51 L.T. 637.

APPEAL by the Compania Arrendataria de Monopolio de Petroleos S.A. from a judgment of BRANSON, J., given on Mar. 15, 1939, and reported [1939] 2 All E.R. 240, where the facts are fully set out. There was a question whether the deviation had been waived, but both BRANSON, J., and the Court of Appeal have held that there was not a sufficient statement of his findings by the arbitrator to test the proper inference to be drawn upon this question, and, on this point, the matter was referred back to the arbitrator. The case is only reported upon the point of the severability of the contract in respect of the two voyages.

A. T. Miller, K.C., and *Sir John Forster* for the appellants.

Sir Robert Aske, K.C., and *R. Colinvaux* (for *A. A. Mocatta* serving with H.M. forces) for the respondents. A

SLESSER, L.J. : This is an appeal from the judgment of **BRANSON**, J., on an appeal to him by way of special case stated from the decision of an umpire in a commercial arbitration between the owners and the charterers of a ship called the Yolanda. The arbitrator has found as B a fact in this case that, as regards the first voyage which the charterparty contemplates, there has been at least one, and I think two, deviations from that contract voyage, which would justify the charterers in repudiating the contract. These two deviations are mentioned by BRANSON, J., in his judgment. They are, first of all, that the ship, C instead of proceeding directly from the port of loading to the contemplated port, deviated, for the purpose of bunkering, to a port called Zonguldak instead of going directly to Istanbul. Then there is found a second deviation, to a port called Bona, at a time when it was not necessary, in the view of the arbitrator, for the purpose of bunkering, D to deviate there.

So far no question and no difficulty arises, and it is conceded that if this charterparty was one for this one voyage only, there was found such deviation as would enable the charterer to repudiate the whole of the contract in accordance with the authorities which have laid down E such stringent rules on this matter, and more particularly the recent case of *Hain S.S. Co.* v. *Tate & Lyle* (1).

The difficulty in this case arises, however, from the fact that this charterparty contemplates a second voyage. After providing, in the first place, that the vessel F

> shall, as ordered on arrival at Istanbul, with all convenient despatch, sail and proceed to Constantza or a safe port in the Russian Black Sea [and then proceed, as may be directed] to one port Spanish Mediterranean, Cartagena-Barcelona range, both inclusive.

There is added by cl. 32 : G

> This charterparty is to remain in force for two consecutive voyages at the same rate of freight and on the same terms and conditions as herein provided.

That is to be read in this way, that the first voyage being completed, the ship must again arrive at Istanbul, and, as ordered, proceed to Constantza or a safe port in the Russian Black Sea, and go, as directed H "to one port Spanish Mediterranean, Cartagena-Barcelona range, both inclusive."

What is said by counsel for the respondent—and this argument has found favour with the judge—is that there are two such voyages, that the mere fact that there has been a deviation on the first voyage does

not enable the charterer to do what he purported to do, namely, to repudiate the whole contract, but that the obligations on the second voyage still stand, though it may be that damages may be obtainable for the wrong done by the deviation on the first voyage. He is really seeking to import into this contract the principle which is so familiar
A in the cases of contracts for the sale of goods by instalments, such as the well-known case of *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (2).

The question really, in my opinion, depends, and depends entirely, upon the construction of the particular charterparty into which these
B charterers and owners have entered, which will indicate what was in the contemplation of the parties, and what they agreed to do. In my view, each of these cases depending entirely on the particular agreement which had been entered into, this was one indivisible contract for the purposes of the two voyages.

C I come to that conclusion for many different reasons. In the first place, there is no indication whatever, to my mind, that this contract is to be regarded as anything but one contract for the purpose of one voyage in a certain prescribed way, followed immediately by what is aptly described as a consecutive voyage. When one looks, for example,
D at cl. 22, which is dealing with the loading date, it is provided in terms:

> Should vessel not be ready to load by Jan. 25, 1938, charterers to have the option of cancelling this charter.

—not "this voyage," but "this charter," so that so far it is clear that if the vessel be not in the port on Jan. 25, both voyages are not to be performed.
E It is to be noted that there is no loading date stated with regard to the second voyage. The second voyage to be on the same terms as the first, but that cannot be applied to cl. 22, which is dealing with the date of Jan. 25. It can only be applicable to the first voyage, and, therefore, all that can be said is this: that at the end of the first
F voyage, there is an obligation, within a reasonable time, to be at Istanbul in order to receive the directions which are to be given under cl. 1 in the case of both voyages, as to where the ship is to sail, and proceed to, and receive directions as to the final destination.

I come to the conclusion that this contract is indivisible for another
G reason. It is provided in cl. 32 that

> the irrevocable credit for the freight on the second voyage is to be established before vessel sails from last discharging port on her first voyage.

Clause 26, which deals with irrevocable credit, says:

> Charterers undertake to establish irrevocable credit for the freight on the first
> H voyage under this charterparty within 5 days of signing this charterparty.

That, of course, cannot be applicable to the second voyage, and, in substitution therefor, it is said that the date for providing the irrevocable credit of the second voyage is to be before the ship sails from last discharging port on her first voyage. This indicates to my mind that this contract is one, and contemplates the second voyage as beginning, in a sense, at the termination of the first voyage, the irrevocable credit for the second voyage is to be made before the vessel sails from the last discharging port on her first voyage, showing that some of the obligations on the second voyage are dependent on the obligations of the first voyage being discharged. I see no reason, therefore, to come to the conclusion that this contract is in any way divisible. A

Another reason which occurs to my mind is this. It is provided that the freight shall be at the same rate on the second voyage as on the first voyage. I think it may reasonably be assumed that, in coming to that conclusion, the parties had in mind that the first contract was going to be performed, and performed in such a way that it could not be B repudiated without deviation, and it might well be that, if the first contract was not performed, the whole market conditions might change; and the whole of the freight seems to be fixed on the assumption that the whole of this contract is going to be carried out. For these reasons I find myself regretfully differing from the judge, who took the view, C as I have said, that there was nothing in this deviation which prevented the obligations arising under the second voyage.

MacKinnon, L.J.: I agree. There was apparently considerable discussion before Branson, J., as to whether putting into the port of D Bona was a deviation, or whether it was a deviation permitted by the terms of the charterparty. I think it is quite unnecessary to go into that. There is no doubt that, on the voyage from Constantza towards Istanbul there was an undoubted deviation, as has been found by the arbitrator. In the lamentably obscure statement of the facts, I am E able to gather that the charterers knew of the deviation at a later date than when they did know about putting into Bona. If that was so, whether putting into Bona was a second deviation is quite immaterial, because there was undoubtedly a deviation by going off to Zonguldak. For that reason I express no opinion on the question whether there was F a second deviation by putting into Bona. Under this contract between these parties there is this provision:

> Should vessel not be ready to load by Jan. 25, 1938, charterers to have the option of cancelling this charter.

Those words are incapable of any doubt; if the vessel did not arrive at G Constantza and be ready to load by Jan. 25, the charterers could cancel both voyages and cancel the whole contract. In addition to that express provision in the charterparty, there is also an implied term in this charterparty, as in all charterparties. That implied term is that the shipowner shall prosecute the voyage or voyages without deviation. H The nature of that implied term has often been stated in the courts, and nowhere more clearly, or with more emphasis, than in the comparatively recent case of *Hain S.S. Co.* v. *Tate & Lyle*, (1), where, at p. 601, Lord Atkin says:

> I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, but a breach of

> such a serious character that however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of its terms.

And similar language is used by LORD WRIGHT, at p. 607. I think that the effect of deviation, which is the breach of that implied term in the contract, is accurately stated in SCRUTTON ON CHARTERPARTIES, 14th A Edn., p. 310, and I will read the passage with more satisfaction because I have satisfied myself that it was written by LORD PORTER and not by myself :

> An owner whose ship deviates in the sense defined above thereby commits a fundamental breach of his contract of carriage. The other party to such contract, B on becoming aware of the deviation, can either treat the breach as a repudiation bringing the contract to an end, or elect to waive the deviation as a final repudiation and treat the contract as still subsisting, reserving his right to damages.

I think that is a correct interpretation of the law. If the implied term was written out in the contract, as the cancelling cl. 22 is, it would be C something to this effect : the shipper shall proceed on the agreed voyage or voyages without deviation except to save life or avoid danger to ship or cargo ; if the shipowner breaks this undertaking the charterer, on becoming aware of it, may cancel this charterparty.

D DU PARCQ, L.J. : I agree, and I do not think I can usefully add anything.

Appeal allowed on first point and case remitted to arbitrator.

Solicitors : *Middleton, Lewis & Clarke* (for the appellants) ; *Holman, Fenwick & Willan* (for the respondents).

E [*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

HALL AND ANOTHER *v.* WILSON AND ANOTHER.

F [KING'S BENCH DIVISION (Oliver, J.), **October 12, 13, 1939.**]

Negligence—Negligence causing death—Damages—Possibility of death in war as combatant or as civilian.

In assessing damages under the Fatal Accidents Act, 1846, it is G proper to take into account the possibility of the man being killed in the war, as a member of the fighting forces if he is of military age, or as a result of air raids. This deduction is to be made although the man was killed before the commencement of the war.

[**EDITORIAL NOTE.** Though this case deals solely with the question of damages, which are usually to be assessed upon the particular facts of each case, it is of H importance as showing how damages may be reduced by reason of the war. At the present time it is of greater importance, since, in many cases, damages will be agreed out of court, and it is essential that those doing so should have all the relevant factors in mind.

AS TO DAMAGES UNDER LORD CAMPBELL'S ACT, see HALSBURY, Hailsham Edn., Vol. 23, pp. 698, 699, para. 986 ; and FOR CASES, see DIGEST, Vol. 36, pp. 138-141, Nos. 916-944.]

Action for damages for negligence causing death brought under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846. The injuries were suffered in a motor-car accident and negligence was admitted.

John Flowers, K.C., and *C. N. Shawcross* for the plaintiffs.

R. Armstrong-Jones for the defendants.

Oliver, J.: This action is framed in two ways. First, it is said the plaintiff is entitled to damages under Lord Campbell's Act; that is, damages for the pecuniary loss to herself and to her family brought about by the death of her husband; and in assessing that sum (because liability is admitted in this case) one has to take a severely practical line, to rule out questions of sentiment, and to give credit for any pecuniary benefit which she has received by reason of the death of her husband, and to offset that against any loss she has suffered. The second way in which the action is put is under the Law Reform (Miscellaneous Provisions) Act, 1934, which entitles the personal representative of the deceased to recover, as a part of his estate, the pecuniary value to him of his expectation of life. Why this form of action should almost invariably be joined with an action under Lord Campbell's Act I never quite understand, because unless the sum awarded for the loss of expectation of life is in excess of that which would be awarded under Lord Campbell's Act, the matter, so far as I can see, from any practical point of view, becomes sheer waste of time. The Court of Appeal have laid it down quite recently that, when you are assessing the damages under Lord Campbell's Act, you have to take into account any benefit which comes to the estate by reason of the death of the deceased person, and in such a case as this there comes as a benefit to the estate that which it is said he has lost, namely, the value of his expectation of life. This comes as a benefit to the widow, and must, therefore—I am not speaking with mathematical exactitude, but for practical purposes—be deducted from the sum given under Lord Campbell's Act. In addition to that, from the point of view of the widow, the sum, if any, awarded under the Law Reform Act must necessarily bear estate duty, whereas that under Lord Campbell's Act, as I understand the Act, would not. However, in this case we need not trouble about that, because it has been agreed that the damages should be assessed under Lord Campbell's Act only, and the other cause of action not proceeded with.

What is the pecuniary loss which this household has suffered by reason of the death of the deceased? He was a man of 31 years of age, in good health, and he had had a fine career. He had started as an apprentice to chemists, and had, at the early age of 31, worked himself up not only to be a manager of one of the stores of Boots, the chemists, but had actually had promotion a year or two ago to a better position, not necessarily pecuniarily very much better, but obviously a better position. At any rate, this is an illustration of how much better it was. In his new position he had eight or ten people under him, and in his former position only about two. His earnings at the time of his death were, as near as makes no difference, £350 a year, and I am quite satisfied from the evidence which has been given that he had not only some prospect, but more than a good prospect, within a year or two, of rising to something like £500 or £600. He had some chance of doing better than that. I quite agree that that kind of speculation is rather treacherous, because there are no less than 300 branch shops and only about 10 of these better positions; but he was in the running for a position which might have brought him £1,000 a year. Now, it is quite obvious, having stated that much, that the pecuniary loss to this family of a man like that is very substantial. One has, on the other hand, to discount this sum by various considerations. I do not pretend to be exhaustively enumerating them, but they are such considerations as this, that he might have been killed in an accident, as anyone might, and that he might, particularly now, have been killed in a war, either as the result of going to fight in it, or as the result, possibly, of air raids which might have terminated his life. Upon reflection, I have come to the conclusion, although with a little doubt, that it would be safer to assume that that additional war risk does apply to this case, although at the moment he died it did not. I have, therefore, discounted the sum which I would have given by making some allowance in respect of that. Necessarily, any figure one fixes must be highly speculative; that is a disadvantage which must necessarily accompany every effort to put into money that which is not assessable in money. Although this lady is now quite firmly of opinion, and perhaps quite rightly of opinion, that she will never marry again, she is an attractive young woman who might marry again; one cannot ignore the possibility that she may marry again, and I take that into consideration. The sum which I have come to the conclusion, in all the circumstances, should be the right one under Lord Campbell's Act is the sum of £3,000, and, inasmuch as the duty is cast upon me of saying how that sum is to be divided, I think it should be divided in these proportions: The widow should have £2,250, the boy £500, and the little girl £250. I am taking into account that although she is younger than her brother, her education will be obviously much less costly. In the ordinary way she will be living with her mother and be looked after by her family. I give judgment for that sum, to be divided in those proportions.

Solicitors: *Adam Burn & Son* (for the plaintiffs); *L. Bingham & Co.* (for the first defendant); *Hewitt, Woollacott & Chown* (for the second defendant).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

OULU OSAKAYETIO OF OULU, FINLAND *v.* ARNOLD LAVER & CO., LTD., AND OTHERS.

[King's Bench Division (Atkinson, J.), **October 6, 17, 1939.]**

Sale of Goods—C.i.f. contract—Insurance—Increased premium due to war risk—Goods shipped on ship of belligerent state.

Contracts for the purchase of timber to be shipped from Finland to Hull were entered into in Oct., 1938, the shipment to be made in Nov., 1938. The contracts were c.i.f. contracts and provided for insurance of the goods, including the risks covered by Institute war and strike clauses in force at time of attachment of insurance, any increase of premium for covering such risks beyond the rates ruling on Sept. 26, 1935, to be for buyers' account. The rate for covering such war risks was on Sept. 26, 1935, 3*d.* per £100; on Oct. 29, 1938, 2*s.* 6*d.* per £100, and that remained the schedule rate at all material times. From Nov. 2, 1938, when a Spanish Government vessel was sunk by enemy action, the rates on Spanish Government vessels rose rapidly. The cover note for the goods here in question stated that the goods were covered at the schedule rate for sailing on or before Nov. 5, but subject to 48 hours' notice of cancellation unless sailing on or before Nov. 28, 1938. The ship in which the goods were shipped was a Spanish Government vessel, which sailed on Nov. 12, 1938, and on Nov. 7, 1938, the shippers' agents informed the buyers that the rate of insurance had been fixed between the sellers and the insurers at £5 per £100. The buyers contended that the sellers were not entitled to charter a ship belonging to a belligerent notoriously weaker at sea than his enemy, and to insure the goods at a premium to be fixed at the discretion of the underwriters on an unknown date of sailing:—

Held: the sellers were not entitled to ship the goods on such a ship, and the buyers were only liable to pay for insurance at the schedule rate.

[EDITORIAL NOTE. It is implied in a c.i.f. contract that the shippers shall act reasonably in taking steps which impose a burden on the other contracting party, and that they shall take all reasonable steps to mitigate the expense to which that party may be put. It is not reasonable to ship goods on a ship belonging to a state actually at war, more especially when the naval forces of that state are weaker than those of its enemy.

As to Insurance Under c.i.f. Contracts, see HALSBURY, Hailsham Edn., Vol. 29, pp. 216, 217, para. 288; and for Cases, see DIGEST, Vol. 39, pp. 582, 583, Nos. 1844-1853.]

Case stated by an arbitrator to determine the liability of the buyers as to payment in respect of increased insurance premium. The facts and arguments are fully stated in the judgment.

R. E. Gething for the appellants, the buyers.

H. G. Robertson for the respondents, the sellers.

Atkinson, J.: This is a case stated by an arbitrator, raising the question as to the liability of certain buyers of timber to pay premiums for covering cargo against war risks. The claimants are shippers in Finland, and there are three respondents. Each of them entered into a c.i.f. contract for the purchase of timber to be shipped by steamer during Nov., 1938, from Pateniemi to Hull. The dates of the contracts were Oct. 6, Oct. 7, and Oct. 8, 1938. The contracts were in the same form, and the relevant clause is cl. 6, which is as follows:

> Before or as soon as tonnage is secured the marine insurance of cargo at f.o.b. invoice value plus 10 per cent. and of freight advance to be covered by sellers with a first-class company or underwriters as per Lloyd's form of policy, together with federation clauses printed in margin, losses payable in London and including the risks covered by the Institute war and strike clauses in force at the time of attachment of the insurance. Any increase in premium payable for covering the whole of such war risks and such strike risks in respect of the country of destination in excess of the rates ruling at Sept. 26, 1935, to be for buyers' account. Sellers' obligation under this contract to insure against war and/or strike risks is subject to the proviso that such insurance can be covered. Should it not be possible to cover such insurance, or should insurance be cancelled by underwriters, sellers shall give prompt telegraphic advice to buyers who shall thereupon have the option of cancelling the contract.

There was an agreed statement of facts for the arbitrator, and from this statement it appears that the shippers' agents on Oct. 18, chartered a steamer belonging to the Spanish Government for the shipment of the timber. On Oct. 26, copies of the charterparty were sent to the several buyers. On Oct. 29, the shippers, through their agents, entered into an agreement with Lloyd's underwriters for insurance to cover war risks on the timber.

The relevant part of the cover note is this:

> Wood goods in and over including freight advance, if any, per "El Neptuno" to Hull including war etc. risks at 3*s.* 6*d.* per £100 sailing on or before Nov. 5, 1938, held covered thereafter at schedule rate on date of sailing but subject to 48 hours' notice of cancelment unless sailing on or before Nov. 28, 1938.

Agreed minimum rates for insuring against war and strike risks are fixed by the Rates Committee of Company and Lloyd's Underwriters, but from Oct. 6, 1937, Spanish and Greek steamers were excluded from these fixed rates, and premiums on cargoes carried in ships were left to underwriters' discretion. The war risk rate on cargo from Baltic ports to the United Kingdom on Sept. 26, 1935, was 3*d.* per £100. On Oct. 29, 1938, the schedule rate was 2*s.* 6*d.* per £100, and that remained the schedule rate at all material dates. The true meaning and effect of the cover note is disputed. The buyers contend that there was an agreement to cover after Nov. 5 at the schedule or general rate on the date of sailing, that is the rate fixed by the committee. The sellers contend that all that it meant was at the rate at which the particular underwriters were covering cargoes on Spanish ships on the date of sailing, in other words, at such rate as the underwriters chose to fix at their discretion.

Clauses 5, 6 and 7 of the agreed statement of facts are as follows:

> (5) On Nov. 2, 1938, the s.s. Cantabria a cargo boat owned by the Spanish Government was attacked by a Spanish Insurgent auxiliary cruiser and sunk by gun fire about 6 miles off Cromer. As a result thereof war risk insurance premiums on Spanish Government vessels (of which the "El Neptuno" was one) rose substantially. (6) On Saturday Nov. 5, 1938, the "El Neptuno" not having yet sailed, the schedule rate referred to in the cover note became applicable. The shippers' agents on the advice of their insurance brokers who feared that this rate was likely to

> increase considerably by the date of sailing, communicated with the underwriters through the insurance brokers by telephone and fixed the premium at £5 per £100. The said wood goods were accordingly held covered at that rate until the vessel sailed which was on Nov. 12, 1938. Between Nov. 5 and Nov. 12 the rate for Spanish vessels in the North Sea rose to 10 guineas. (7) On Monday Nov. 7, 1938, the shippers' agents informed the buyers by telephone of the rate of insurance so fixed as aforesaid. The buyers stated they would not pay any such rate.

When the documents were presented, the buyers refused to pay the £5 per £100, and it was then agreed that the amount to be paid by them for covering the timber against war risks should be left to arbitration.

The arbitrator has stated his award in the form of a special case, expressing his view that the respondents to the arbitration, that is the appellants here, the buyers, are liable to pay the full £5. The question is whether that view is right, whether the sellers were entitled to charter a ship belonging to a belligerent who was notoriously much weaker at sea than his enemy, and to insure the goods at a premium to be fixed at the discretion of the underwriters on an unknown date of sailing. The shippers contended before me that they were entitled to ship by any steamer they liked. They said the contract contains no limitation whatever upon their choice of steamers.

I have a vivid recollection of seeing one of General Franco's destroyers patrolling outside the breakwater at Gibraltar, waiting to sink a ship belonging to the Spanish Government, which was just inside the breakwater, if and when she came out. I asked Mr. Robertson whether, in similar circumstances, he contended that the shippers would have been entitled to charter the ship within the breakwater. He said they would have been so entitled, although, of course, no underwriters would insure at less than £100 per £100 worth of goods, or thereabouts. I think there must be a flaw in an argument which leads inevitably to such a result. I doubt very much whether the shippers were entitled to ship by a steamer actually belonging to a belligerent or by any steamer which, by reason of circumstances peculiar to itself or its flag, made the burden of insurance against war risks heavy beyond the ordinary schedule rates, or, at any rate, to select such a ship except at their own cost as to excess premiums. It is implicit in the contract that the shippers should act reasonably where they are to take a step which will impose a burden upon their contracting party. I think they were bound to take all reasonable steps to make that burden as light as they properly could. I do not think that it was reasonable to charter a ship which belonged to a state actually at war.

It is said that the buyers were sent the charterparty and never objected to it. There is no evidence that they knew anything about the insurance of cargoes carried on Spanish ships. It is also said that there is no evidence that the shippers could have chartered any other ship. It is equally true that there is no evidence that they could not. If this was a relevant consideration, I think it was for the shippers to justify a choice which was so adverse to the interests of the buyers.

In my view, there is a greater difficulty in the claimants' way. What
was their obligation as to insuring ? As soon as tonnage was secured,
insurance of cargo was to be covered by them with underwriters. Any
increase of premium payable for cover in excess of rates ruling on
Sept. 26, 1935, was to be for buyers' account. It is true that a fixed
A premium is not essential to a valid policy, but the question is what was
the meaning of that obligation. I think that this obligation contem-
plates an insurance effected on or about Oct. 18 at a premium to be then
fixed, and fixed by reference to schedule rates then payable.

No point is made by the buyers as to the delay in covering, but, be
B that as it may, certainly in my view it did not contemplate or permit
insurance at a premium not then fixed but which was to be left to the
discretion of the underwriters on the date of sailing. Such a bargain
would defeat the whole purpose of the obligation to insure as soon as
tonnage was obtained. It would be a gamble at the buyers' risk, the
C very thing, as I think, which the buyers were seeking and the sellers
contracting to avoid. And in this case the gamble was in connection
with a belligerent ship for which war risks might vary from day to day,
according to the ups and downs of the war. An interpretation which
permitted such a bargain would be giving no effect, in my view, to the
D words "payable for covering." I think that means "payable at the
time of obtaining cover and in consideration of the cover." If it was
not possible to obtain cover at an agreed premium, the final words of
the clause require the seller to give notice to the buyer, who then has
the option of cancelling.

E Then this question arises. What was the effect of the cover in fact
obtained ? Here the claimants are in a dilemma. If, as the buyers
say, the cover note meant what it said, the underwriters thereby agreed
to cover after Nov. 5 at the schedule rate on date of sailing, and if the
shippers had held the underwriters to their bargain only 2*s.* 6*d.* would
F have been payable. I think that the agreed statement of facts makes
it clear that there was only one schedule. That is the schedule agreed
by the rating committee. And on the agreed statement of facts Spanish
steamers were left to underwriters' discretion. There was no such thing
as a special schedule applicable to Spanish ships, but, of course, there
G was nothing to prevent the underwriters agreeing to insure them at the
general schedule rates, and the buyers contend that that is what the
sellers in fact did. If the buyers are right in this contention, the
claimants must fail to recover more than 2*s.* 6*d.*, and I think the same
result follows if the shippers are right in their contention as to the
H meaning of the cover note. They say "schedule rate" did not refer
to the one and only schedule, namely that fixed by the rating committee,
but that it meant the rate underwriters were in fact asking, at their
discretion, on the date of sailing. I repeat that, if they are right in
this contention, one upon which their agents and underwriters acted,
doubtless as to the underwriters with considerable satisfaction, I think

that the cover effected was not authorised by the contract, even if they were entitled to ship by a Spanish ship.

Question answered accordingly, the appellants to have the costs of this hearing.

Solicitors: *Pritchard, Sons, Partington & Holland*, agents for *Andrew M. Jackson & Co.*, Hull (for the appellants); *Slaughter & May* (for the respondents).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

MORLEY *v.* STAFFORDSHIRE COUNTY COUNCIL.

[Court of Appeal (MacKinnon and du Parcq, L.JJ., and Bennett, J.). **October 4, 5, 1939.]**

Negligence—Children—Allurement—Child injuring itself upon obvious danger not part of the allurement.

The defendants, a highway authority, for the purpose of repairing a highway, had roped off a portion of it, and had there stacked a quantity of the steel lattice work which is used for reinforcing the concrete bed of the road. Near this stack of metal was a heap of sand, with which children had been allowed to play. A child, six years of age, who had been playing with the sand, passed over a very rough part of the road and injured himself by colliding with the stack of metal. It was contended that the heap of sand was an allurement to children and that there was a causal connection between that and the injury received from the stack of metal:—

Held: assuming the child to have been a licensee, the metal was not a trap, and such allurement as there was in the sand had no causal connection with the accident. The defendants were, therefore, not liable.

[EDITORIAL NOTE. This case is of importance as an unsuccessful attempt to extend the doctrine of allurement. It was sought to be said that the child had been allured into a place of danger, but it is held that this will not avail an infant plaintiff who runs into what is an obvious danger.

As to Allurement, see HALSBURY, Hailsham Edn., Vol. 23, pp. 584-586, para. 836; and for Cases, see DIGEST, Vol. 36, pp. 69, 70, Nos. 445-453.]

Case referred to:

(1) *Liddle* v. *North Riding of Yorkshire County Council*, [1934] 2 K.B. 101; Digest Supp.; 103 L.J.K.B. 527; 151 L.T. 202.

Appeal by the defendants from a decision of Hawke, J., dated Mar. 2, 1939. The facts are fully set out in the judgments.

P. E. Sandlands, K.C., and *Kenelm Preedy* for the appellants.

J. Bourke for the respondents.

MacKinnon, L.J.: The Staffordshire County Council in 1938 were engaged in reconstructing a road. They were taking out the old roadway, and replacing it by a concrete road. From Milton to Leek they had stopped the thoroughfare, as they were entitled to do, by putting a barrier at the northern end right across the road, and a barrier at the southern end half-way across the road, with a rope, sometimes put up and sometimes left down, across the remaining part of the road. There were notices at either end of this portion of the road where the barriers were, stating that the road was closed. There were also some ropes roping off the metalled part of the road which was being renewed, leaving inside the ropes, up against the hedges, a footpath for people to get to the houses along there. There were heaps of sand in various parts of these works, and there was, in particular, one heap of sand outside the southern barrier on the side of the road.

There was evidence that, notwithstanding the stopping of the highway, children, without any interference from the defendants' workmen, were allowed to play with this sand in this heap and in other heaps, in the portion of the road which was being renewed. The infant plaintiff had been playing with this sand. Having done so, he walked into the closed part of the roadway, at a place where the road had been excavated and where a very rough state of the surface existed. There was a hole dug in the roadway. There were various planks and other things lying about. Altogether it was quite clearly a part of the roadway that certainly no vehicle could use and no pedestrian could use except with considerable care.

On the afternoon of May 24, in the course of supplying material for this roadmaking, the defendants' servants had, at the lower end, unloaded a number of sheets of metal, or rather, not sheets but nets, as it were, of metal, which were to be used as the steel reinforcement of the concrete roadway. They were light steel nets, of very large mesh, with projecting pieces of wire and metal coming out of the edges. They were piled up there by the road. When the infant plaintiff was walking or proceeding through this very rough part of the highway, or what once had been the highway, he, in some way as to which there is no evidence, and as to which nothing is known, caused one of his eyes to come in contact with some part of one of these metal sheets or nets, resulting in a very severe injury to his eye.

The question is whether in those circumstances the defendant county council is liable to pay compensation to the child and his father for the expenses incurred with regard to this accident to the child. That involves two questions. First of all it was suggested by counsel for the appellants that the child was a trespasser when he was in this piece of roadway which was proximate to this stack of metal. We have had considerable argument upon the question whether the child was a trespasser or a licensee. While I have very grave doubt as to the proper answer to that—the evidence is left in considerable confusion—it is perfectly manifest that this roadway had been closed as a highway. It is also manifest that side paths had been arranged for pedestrians which did not seem to include this particular part where the boy must have been when he hit this metal. There is, however, some evidence that, notwithstanding these notices and the closing of the highway, and the provision of these roped-off footpaths, some people did use this little piece of excavated roadway. I think it is quite likely that they did so, because people living on the east side of the roadway, if they wished to go towards Milton by the footpath which had been roped off and theoretically maintained by the county council, would have to go a long way in the opposite direction across the road, and then turn back on their path. As I say, I have very great doubt whether the proper answer to that first question is not that the child was a trespasser ; but I do not think it necessary to make a definite finding about that because, even if the child was a licensee at this spot, I think the defendants are not liable. I will assume when the child was at this spot in the proximity of this metal heap, he was there as a licensee.

If that be so, what is the duty of the county council to a child upon its premises, upon its highway, who is in the status of a licensee ? I think the nature and extent of it is expressed quite succinctly and quite accurately in one paragraph in the judgment of SCRUTTON, L.J., in *Liddle* v. *Yorkshire* (*North Riding*) *County Council* (1), at p. 112 :

> In my opinion to make the landowner liable for injury to a child on his land, it must be proved that he expressly or impliedly invited children on to his land, and either did an act which caused damage with knowledge that it might injure the children, or knowingly permitted the existence on his land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable.

There is, perhaps, only one slight addition which ought to be made to the statement in that paragraph, that is, that he will be liable if, in addition to permitting the child upon the land, he has, in regard to a particular object upon the land, an object which has in it a hidden danger, allured the infant plaintiff by putting an object which has, in the words of HAMILTON, L.J., the two qualities of fascination and fatality.

Assuming, as I have said, that this child was in the neighbourhood of this metal, with the leave and licence of the county council, I am unable to see, upon the facts, that there was any allurement. The evidence does not suggest that there was, in this heap of metal, any allurement. It is said that the father of the child was allured to it, because he was interested in its bright appearance. It was not as rusty as such metal usually is. He was so allured by that fact that he went to examine it, I suppose, to see whether it was aluminium or new steel, or what it was. But it is not suggested that there was any allurement to the child at all, because there is no evidence of it attracting him in any way. Consequently I think there is no trap in that. There is nothing in the nature of a trap. It was not like the turntable in one of the cases, a thing which would be set in motion by a child, and, when set in motion, would be dangerous. There was no movement about this heap of metal ; it was entirely static. Thirdly, I think there was no concealed danger about it. It was as much, or as little, dangerous as any other obstacle on which a human being might hurt himself or hurt herself by violently impinging himself against it. It was as much, or as little, dangerous as barbed wire along a fence. It is just, I think, as impossible to suggest that if a landowner gave a licence to children to go into his close, and there was some barbed wire in the fence round that close, he would be liable to the child who ran into the barbed wire and cut himself or injured his eye. So here, I think it is impossible to say, this being a manifestly spiky piece of iron put there, and manifestly dangerous if you run into it, that there was any concealed danger about it. " For obvious dangers," as Scrutton, L.J., said in the last sentence in the paragraph I quoted, " such as unguarded water, natural or artificial, he will not be liable." This, I think, was an obvious danger, in so far as it was a danger at all ; just as obvious as the fact that there were pieces of wood and other obstacles which would be dangerous if somebody tripped over them, and fell and broke their arm.

The result, assuming, as I have said, that this child was there as a licensee, is that the defendants are not liable for this disastrous accident to the child ; because, in so far as this metal was a danger, it was an obvious danger ; and, therefore, not one for which the landowner is liable even to a child. For these reasons, I think that this case was wrongly decided, that the appeal should be allowed, and judgment entered for the defendant council with costs.

du Parcq, L.J. : I agree ; and I add a few words of my own only because we are differing from the judge. I agree that there may be some doubt as to whether this child was a trespasser or a licensee. I should not be prepared to disagree with the finding of the judge that he was a licensee. I think that there was evidence that members of the public were permitted by the defendants to walk upon the part of the road on which this heap of metal was placed.

It seems to me, however, that all the discussion that took place about the heap of sand, as to how far it was scattered, is really a little beside the point. I do not think the heap of sand has very much importance in this case. It is true that, if it had not been for the heap of sand, the child would not have been in this neighbourhood at all ; but there is not enough to show any causal connection between the fact that the child had played with the heap of sand and afterwards injured himself on this metal stack. The fact is that the child was walking or running upon the roadway near the stack of metal. As I say, I will assume that he was there as a licensee. I accept the finding of the judge that the child suffered his injuries not when he was clambering on to the stack but, to use his own expression : " I was going round the corner of the iron things, and one went in my eye "—I am there quoting from the judgment in the court below.

If so, the question is simply this. The child, who is a licensee walking along the road, runs into a stationary object which has been left there. Anybody of age to understand danger at all, with the most rudimentary knowledge of what objects are dangerous, knows that if you run into a hard stationary object, the part of your body which collides with it will be hurt, and may be more or less seriously injured. In those circumstances, if the owner or occupier of the land leaves a stationary object that will injure anybody who runs into it, is he liable for the injury caused to a child of six who does run into it ? I think the answer to that question must be No. As has been said, it was not a trap ; it was not a concealed danger. The important distinction between the cases of children and the cases of grown-up persons, when one is considering the position of a licensee and the question of what is a trap, is this. You may well have something which to a child constitutes a temptation, whereas to a grown-up person it would not constitute a temptation at all. No grown-up person is very likely to be tempted to get on to a turntable, and play about on it ; but a child is very likely to be so tempted ; and everybody knows it. But that point does not arise in this case at all. The question of allurement goes when one understands that it was an unhappy accident which might have occurred to a very careless, blind, or short-sighted grown-up person. I think it is quite impossible to say—and it would be contrary to all the decisions to say—that an occupier of land is bound in respect of a licensee, whether a child or an adult, to make his land absolutely safe, and to secure that there are no objects upon it with which a child, from whom one must not expect too much care, may collide, or by which he may injure himself if he does collide. One has only to state the proposition to see that such a burden could not possibly be imposed upon any owner or occupier of land. In some cases it is right to say that a child is of such tender years that the invitation or licence cannot be taken to extend to it unless accompanied by a grown-up person who does understand danger, but, in this case, it would be idle to say, with regard to that child of six, accustomed to play by himself, and not, I should think, a delicately nurtured child, but accustomed to take some responsibility, however tender one may think his age, that he did not know perfectly well that if you run into a sharp object, you will hurt yourself. No blame, therefore, attaches to the defendants ; and they were not under any duty to the plaintiff which they have failed to perform. I agree that this appeal must be allowed.

BENNETT, J. : I also agree. I think the case should be decided upon the assumption that the plaintiff was a licensee. Upon that footing the law to be applied is to be found in the judgment of SCRUTTON, L.J., in *Liddle* v. *Yorkshire* (*North Riding*) *County Council* (1), at p. 112.

It seems to me to be plain that this heap of lattice-work was not a trap. On the question of whether, in any real sense of the term, it could be regarded as dangerous, one can only say that there is nothing with which a child cannot hurt itself. It can hurt itself, put its eye out, by falling into a hedge, if it happens to collide with or strike its eye against a sharp piece of wood. I, myself, would say in this heap of lattice-work there was really nothing dangerous in the sense in which that term has been used in the cases applying to children.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. L. Underwood*, Stafford, clerk to the Staffordshire County Council (for the appellants); *Abberley & Walker*, Burslem (for the respondent).

[*Reported by* C. St.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

HAGAN AND ORS. *v.* EFFUAH ADUM AND ORS.
HAGAN AND ORS. *v.* ARABA TANUAH.

[PRIVY COUNCIL (Lord Thankerton, Lord Alness, Lord Fairfield), **June 13, 15, July 7, 1939.**]

Privy Council—West Africa—Succession—Jurisdiction of Native Tribunal—Native Administration Ordinance, 1928, *c. iii, s.* 43.

Under the Native Administration Ordinance, 1928, the Native Tribunal have jurisdiction to try suits and matters relating to the succession to the property of a deceased native who had, at the time of his death, a fixed place of abode within the state, and such jurisdiction includes the valuation and distribution of the estate. The jurisdiction is not precluded by a grant of letters of administration to the estate of the deceased by the Divisional Court, nor by the fact that the share of the estate in dispute exceeds £100 in value.

[**EDITORIAL NOTE.** The decision in this appeal decides points in the administration of the law of succession in the colony, which have been debated for some time. It is confined to the estates of natives resident in the colony at the time of their death.

AS TO WEST AFRICAN COURTS, see HALSBURY, Hailsham Edn., Vol. 11, p. 203, para. 386; and FOR CASES, see DIGEST, Vol. 17, pp. 452, 453, Nos. 212-216.]

Case referred to:

(1) *Connecticut Fire Insurance Co.* v. *Kavanagh*, [1892] A.C. 473; 16 Digest 155, *551*; 61 L.J.P.C. 50; 67 L.T. 508.

CONSOLIDATED APPEALS from two judgments of the West African Court of Appeal, Gold Coast Session (SIR DONALD KINGDON, C.J. (Nigeria), WEBBER, C.J. (Sierra Leone), and WOOLHOUSE BANNERMAN, J.), dated Dec. 19 and Dec. 21, 1935. By the judgment, dated Dec. 19, 1935, the Court of Appeal dismissed the appeal of the appellants from a judgment of the Court of the Provincial Commissioner of the Central Province of the Gold Coast Colony, dated July 12, 1935; and by their judgment, dated Dec. 21, 1935, the Court of Appeal allowed the appeal of the respondent Araba Tanuah from a judgment of the Divisional Court, Cape Coast (STROTHER-STEWART, J.) dated Mar. 25, 1935. The judgment of their Lordships was delivered by LORD THANKERTON.

Roger Pezzani for the appellants.

Hon. C. R. R. Romer, K.C., and *Alan Orr* for the respondents.

Lord Thankerton: These are two appeals, consolidated by order of the Board, against two judgments of the West African Court of Appeal, dated respectively Dec. 19, and Dec. 21, 1935, in two suits relating to the estate of the late Thomas Hagan, a native, who died at Winneba in the Central Province of the Gold Coast Colony on July 9, 1931. The appellants, brothers and sister of the deceased, were granted letters of administration of his personal estate by the Divisional Court of the Province on Feb. 22, 1932. The respondents Effuah Adum and her children claim to be interested in the estate, both real and personal, as the domestic " slave-wife " and children of the deceased. The respondent Araba Tanuah claims to be interested in the estate as head of the family of the deceased. It is common ground that the succession to the estate falls to be determined according to native customary law. The first suit, which may be referred to as suit A, was initiated by the issue of a summons in the Native Tribunal of Winneba on Nov. 21, 1933, by the respondent Adum, on behalf of herself and her children, calling on the present appellants to declare the value of the estate of the deceased, and to show cause why her share, and that of her children, in the estate should not be designated.

On Nov. 28, 1933, the appellants applied to the Court of the Provincial Commissioner of the Central Province for the transfer of the suit to the Divisional Court on the ground that the Native Tribunal had no jurisdiction to try it, and the Native Tribunal thereupon suspended the hearing. On Feb. 2, 1934, the Court of the Provincial Commissioner dismissed the application, finding as a fact that the deceased had lived and died at Winneba, and holding that the Native Tribunal had jurisdiction. The appellants appealed to the Divisional Court of the Province, but withdrew the appeal by leave of the Court on Oct. 27, 1934, with a view to reaching an amicable settlement. On Dec. 21, 1934, hearing notices in suit A were issued, and on Jan. 3, 1935, the Tribunal granted an *ex parte* motion by the respondent Araba, as head of the family of the deceased, to be joined as co-plaintiff. On Jan. 8, 1935, the hearing before the Native Tribunal was resumed. The appellants again objected to the jurisdiction of the Tribunal, but this objection was over-ruled, in view of the decision of the Provincial Commissioner's Court on the motion for transfer. The appellants thereafter refused to cross-examine or give any statement before the Tribunal, and, after hearing evidence, the Native Tribunal held that the value of the personal estate had been proved to be about £15,000, and gave judgment in favour of the respondent Adum and her children for one-fourth of the £15,000, which was £3,750, plus one-fourth of the immovable properties, and the remaining three-fourths of the amount of the personal estate and the immovable properties were to be under the control of the respondent Araba Tanuah, the head of the family of the deceased.

The appellants appealed to the Court of the Provincial Commissioner, but, at the hearing of the appeal on July 12, 1935, the court sustained an objection by the respondents that the appeal was not competent in that court, and dismissed the appeal. On an appeal, this decision was affirmed by the West African Court of Appeal on Dec. 19, 1935. This judgment is the first of the two judgments against which this appeal is taken.

Turning now to the second suit, which may be called suit B, the writ was issued in the Divisional Court of the Central Province on Feb. 6, 1935, by the respondent Araba Tanuah against the appellants, claiming as head of the family for herself and on behalf of other members of the family, of which she stated the appellants were members, that account should be taken of all the personal estate of the deceased, which had come into the possession of and under the control of the appellants prior to and since the grant of letters of administration by the court to the appellants, and for an administration order to be made in regard to the estate. By judgment dated Mar. 25, 1935, the Divisional Court (STROTHER-STEWART, J.) gave judgment for the present appellants. The judge was satisfied that the respondent Araba Tanuah was head of the family to which the appellants belong, but he held that she had not established such an interest as would entitle her to call the appellants to account, as it had not been proved that she or the members of the family, other than the appellants, were entitled to any portion of it. The judge disregarded the decision of the Native Tribunal in suit A, although it had been submitted to him that that judgment constituted *res judicata.* On an appeal by the respondent Araba Tanuah, the West African Court of Appeal on Dec. 21, 1935, set aside the judgment of the Divisional Court, and granted the respondent the relief claimed by her. This judgment is the second judgment here appealed against. The Court of Appeal agreed with the finding of the Divisional Court that the respondent was head of the family, but they held that the question whether the property was self-acquired or whether the respondent had any interest in it was decided by the Native Tribunal in the respondent's favour and was binding.

In the first place, an attempt by the appellants to found on an alleged arbitration award, prior in date to the decision of the Native Tribunal, may be disposed of. It is perhaps enough to say that the contention that there was a binding award, which precluded the respondent Adum from suing on anything but the award, appeared for the first time in the body of the appellants' case in this appeal, but it does not appear among the reasons of appeal. Further, although some of the arbitrators gave evidence as to it at the hearing before the Native Tribunal, its date is not proved, and the evidence was quite insufficient to prove that the award was accepted as final and binding by the parties. It is not surprising, therefore, to find the present appellants' pleader, at the hearing before the Divisional Court on Feb. 20, 1935, maintaining that the arbitration did not eventuate into an award. Their Lordships, in these circumstances, are not prepared to entertain, at this late stage, such a contention, as they are not satisfied that the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. *Connecticut Fire Insurance Co.* v. *Kavanagh* (1), at p. 480.

The appellants' main contentions challenge the jurisdiction of the Native Tribunal over the subject matter of suit A. Suit A relates to the whole estate of the deceased, both real and personal, while suit B relates only to the personal estate, but the judgment against the appellants in suit B assumes the validity of the judgment of the Native Tribunal. The jurisdiction of a Paramount Chief's Tribunal at the material date, was conferred by sect. 43 of the Native Administration Ordinance, 1928, c. *iii*, which provided as follows :—

> 43.—(1) A Paramount Chief's Tribunal shall have and may exercise within the State of such Paramount Chief civil jurisdiction for the hearing and determination of the causes and matters hereinafter mentioned in which all parties are natives and the defendant was at the time when the cause of action arose within such state, or in which any party not being a native consents in writing to his case being tried by such Paramount Chief's Tribunal.
>
> Provided always that a Paramount Chief's Tribunal shall not, unless the parties shall agree thereto, have any jurisdiction in any cause or matter where it appears either from express contract or from the nature of the transactions out of which such cause or matter shall have arisen that the parties expressly or by implication agreed that their obligations in connection with such transactions should be regulated substantially according to the provisions of some law or laws other than native customary law, or where otherwise some other such law or laws as aforesaid is or are properly applicable thereto.
>
> (2) The causes and matters hereinabove in this section referred to are the following :—
>
> (*a*) Suits to establish the paternity of children, other than suits in which some question affecting rights arising out of any Christian marriage is or may be involved ;
>
> (*b*) Suits relating to the custody of children, other than suits in which some question affecting the rights arising out of any Christain marriage is or may be involved :
>
> (*c*) Suits relating to the ownership, possession, or occupation, of lands situated within the state of such Paramount Chief ;
>
> (*d*) Suits for divorce and other matrimonial causes between natives married under native customary law ;
>
> (*e*) Personal suits in which the debt, damage, or demand does not exceed one hundred pounds ;
>
> (*f*) Suits and matters relating to the succession to the property of any deceased native who had at the time of his death a fixed place of abode within the state ; and
>
> (*g*) Any other causes and matters by this ordinance expressly assigned to a Paramount Chief's Tribunal or to a Divisional Chief's Tribunal.

In the first place, the appellants maintained that it had not been established that the appellants were "at the time when the cause of action arose within such state." This question of fact, however, was decided against the appellants on their motion for transfer of suit A by the judgment of the Provincial Commissioner's Court dated Feb. 2, 1934, the appeal against which was withdrawn by the appellants, and their Lordships are not prepared to entertain this contention now.

In the second place, the appellants submitted that the letters of administration having been granted by the Divisional Court of the Province, suit A should have been instituted in that court, which, if it had so desired, could have referred any question relating to native customary law to a Native Tribunal under sect. 59 (1) of the Ordinance.

They further suggested that, by her part in suggesting that the appellants should be the parties to apply for the letters of administration, the respondent Araba Tanuah had elected to proceed in that court; and, lastly, that a writ to have the estate valued and a share declared was not within the head (*f*) of sect. 43 (2). These points really all turn on the proper construction of head (*f*). Counsel for the appellants submitted that this head only included suits as to the right to succeed, and did not include such matters as valuation of the estate, a declaration as to the amount of the share to which a successor was entitled, or the distribution of the estate. Their Lordships see no reason for such a narrow construction of the words "suits and matters relating to the succession to the property," as, in their opinion, distribution of the estate naturally comes within the meaning of these words, and valuation of the estate is necessarily incidental to ascertainment of the shares for the purpose of distribution. They agree with the view expressed by both the courts in suit A that that suit is a suit relating to the succession to the property of the deceased within the meaning of head (*f*) of sect. 43 (2). If this be so, there can be no reason why letters of administration should not be obtained in one court, and proceedings relating to the distribution of the estate should be dealt with by another court. There can be no reason for rendering nugatory the jurisdiction conferred by head (*f*), and none of the courts below have felt any practical difficulty in the matter. Accordingly the application for letters of administration in the Divisional Court cannot preclude any party from instituting proceedings relative to distribution before the Native Tribunal.

The appellants maintained, thirdly, that suit A was a personal suit for more than £100, and that the jurisdiction of the Native Tribunal was excluded by the terms of head (*e*) of sect. 43 (2), and, fourthly, it being admitted that two houses which formed part of the succession were not situated within the state, that jurisdiction was excluded by the terms of head (*c*) of sect. 43 (2). Both these contentions are based on a construction of sect. 43 (2) which their Lordships do not accept. In their opinion, while each of the heads (*a*) to (*g*) is subject to the provisions of subsect. (1) of sect. 43, each head in subsect. (2) affords a self-contained subject of jurisdiction, which is independent of the other heads, and it is illegitimate to import the qualifications or conditions expressed in one of the heads into any of the other heads. From this it follows that as suit A falls within head (*f*) and satisfies the provisions of subsect. (1), heads (*c*) and (*e*) of subsect. (2) are irrelevant on the question of jurisdiction. Both courts below took the same view. Their Lordships are therefore of opinion that the Native Tribunal had jurisdiction to deal with suit A.

Lastly, the appellants sought to have the judgment of the Native Tribunal reviewed on the merits by this Board, but their Lordships agree with the West African Court of Appeal that the judgment of the

Native Tribunal is now final and binding on the appellants. That judgment was given on Jan. 8, 1935, and the appellants appealed to the Court of the Provincial Commissioner, leave to appeal being granted on May 4, 1935. That appeal was dismissed on the ground that suit A was a suit relating to the succession of property, in regard to which the only right of appeal lay to the Court of the District Commissioner under sect. 74 of the Ordinance, and was not a suit or matter relating to the ownership, possession or occupation of any lands, an appeal in which would lie to the Court of the Provincial Commissioner under sect. 75 of the Ordinance. As already pointed out, this judgment, the reasons for which are in conformity with the views expressed by their Lordships, is final and binding on the appellants. Under sect. 76 of the Ordinance, no appeal lies under sect. 74 unless notice of appeal is given within four months from the date of a decision by a Paramount Chief's Tribunal. The appellants did not give notice of an appeal under sect. 74 within the period so prescribed, and the fact that under sect. 29 of the Commissioners Ordinance, c. 23, 1928, every Provincial Commissioner is *ex officio* a District Commissioner cannot avail to remedy this omission on the part of the appellants. The judgment of the Native Tribunal is therefore final and binding on the appellants, and it follows that the Court of Appeal were right in setting aside the judgment of the Divisional Court in suit B, and in holding that the respondent Araba Tanuah had sufficient interest to entitle her to an accounting by the appellants, and in granting her the relief claimed by her.

The appeal, accordingly, fails as regards both suits, and their Lordships will humbly advise His Majesty that the appeal should be dismissed and that the judgments appealed against should be affirmed. The appellants will pay to the respondents their costs in the appeal.

Appeal dismissed with costs.

Solicitors: *A. L. Bryden & Co.* (for the appellants); *Linklaters & Paines* (for the respondents).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

R. v. ARMY COUNCIL, *Ex parte* SANDFORD.

[King's Bench Division (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **October 19, 1939.**]

Royal Forces—Army—Applicant convicted on five charges by court-martial—Convictions on four charges quashed by Army Council, but conviction on remaining charge confirmed—Whether Army Council bound to mitigate, remit or commute sentence—Army Act, ss. 57 (1), 70 (1), (2)—*Rules of Procedure*, 1926 (*S.R. & O.*, 1926, *No.* 989), *r.* 54 (A), (B), (C).

The applicant was convicted on five charges of felony before a court-martial and sentence of dismissal from the service was promulgated on Mar. 5, 1934. In May, 1934, the Army Council, having reviewed the proceedings at the applicant's request, quashed the convictions on four of the charges, but did not mitigate, remit or commute the sentence in view of the serious nature of the remaining charge—uttering a forged document—in respect of which the conviction was confirmed. The applicant applied for an order that the Army Council do mitigate, remit or commute the sentence so passed upon him, and contended that, upon a true construction of Rules of Procedure, 1926, r. 54, made under sect. 70 of the Army Act, it was the statutory duty of the Army A Council so to mitigate, remit or commute the sentence as some of the convictions had been quashed :—

HELD : upon a true construction of r. 54, it did not necessarily follow that, because the convictions on four charges were quashed, the maximum sentence could not stand with reference to the remaining conviction.

B **[EDITORIAL NOTE.** The construction of the rules governing the procedure in respect of army offences have a particular importance at the present time, which makes this decision upon the powers of the Army Council, when reviewing the findings of a court-martial, of more than usual importance. The question that arises upon the construction of the rule is the familiar one whether the word " shall " used therein is imperative or merely permissive.

C AS TO CONFIRMATION OF SENTENCES OF COURTS-MARTIAL, see HALSBURY, Hailsham Edn., Vol. 28, pp. 597, 598, paras. 1225-1227 ; and FOR CASES, see DIGEST, Vol. 39, pp. 341, 342, Nos. 271-277.]

MOTION for a writ of mandamus that the Army Council be commanded according to law to mitigate, remit or commute a sentence promulgated D on Mar. 5, 1934, whereby the applicant, Herbert Ronald Sandford, was dismissed the service of H.M. Army in India. The facts and the arguments are set out in the judgment of LORD HEWART, L.C.J.

D. N. Pritt, K.C., and *S. A. Kyffin* for the applicant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), and E *Valentine Holmes* for the respondents.

LORD HEWART, L.C.J. : The grounds of this application are set forth in the statement served with the application for leave to issue notice of motion. By para. 3 of that statement, over the hand of the F applicant, it appears that the grounds are :

> that the said applicant having been charged before a court-martial with five charges of felony and having been convicted on all the said five charges, which findings were duly confirmed and sentence promulgated of dismissal of the applicant from the service, the army council having reviewed the proceedings before the said court-martial and having quashed the convictions on four of the said charges did G not mitigate remit or commute the said sentence as it was their statutory duty to do in accordance with Rule of Procedure 54 (B) made under sect. 70 of the Army Act.

There is included among the papers, which are before the court, an affidavit sworn by the applicant on Apr. 19, 1939. It appears from that H affidavit that between Jan. 8 and Jan. 29, 1934, the applicant was tried by a general court-martial held at Quetta and Karachi on five charges of offences under sect. 41 of the Army Act. The affidavit states :

> The said charges were two charges of forging documents with intent to defraud and three charges of uttering forged documents knowing the same to be forged with intent to defraud. . . . I was found guilty on all the said charges, these findings were duly confirmed and by sentence promulgated on Mar. 5, 1934, I was dismissed from the service.

The affidavit goes on to recite that in May, 1934, a petition was made to the Army Council to review the proceedings, and that the Army Council did review the proceedings, and a decision was given, as appears by letter dated July 19, 1934. The letter is written by command of the Army Council, and the writer of this letter from the War Office states:

> As a result of this consideration the Secretary of State for War has been advised that the convictions on the first, second, fourth and fifth charges shall be quashed and the council have therefore directed that all record of the convictions on those charges is to be erased from relevant documents and that you are to be relieved of the consequences of the said convictions. In view of the nature of the third charge upon which the conviction stands, the Army Council can see no ground for interfering with the sentence passed by the court and the necessary notification will be published in the LONDON GAZETTE of Aug. 3, 1934.

It has been conceded at the bar, and it appears from this affidavit, that the third charge in this document was a charge of uttering a forged document. It is clear, therefore, that the applicant for this rule was convicted of uttering a forged document; that he was thereupon dismissed the service of His Majesty, and that, upon petition to the Army Council, the conviction and the sentence were ordered to stand, and the necessary notification was duly published in the Gazette.

It is in those circumstances that now, in 1939, a writ of mandamus is sought from this court to order that the Army council do mitigate, remit or commute the sentence so passed upon the applicant. We have had an argument in support of the application, an argument turning upon the construction of the Army Act and of certain of the Rules of Procedure, 1926, made under the Army Act; and the counsel for the applicant permitted himself to say, among other things, that there was no escape from the construction of the Rules of Procedure for which he was contending. In my opinion, the argument so made was entirely misconceived, and I agree entirely with the observations which the Attorney-General has been good enough to make; and I entirely fail to discover in those observations or any part of them any fallacy such as is suggested by counsel for the applicant, or any other fallacy.

The root of the matter apparently derives from a misreading of the Rules of Procedure, 1926, r. 54. By that rule it is provided as follows:

> (A) Where a sentence has been awarded by court-martial in respect of offences in several charges, and the confirming authority confirms the finding on some but not on all of those charges, that authority shall take into consideration the fact of such non-confirmation, and shall mitigate, remit, or commute the punishment awarded as may seem just, having regard to the offences in the charges the findings on which are confirmed. (B) Where a sentence has been awarded by a court-martial in respect of offences in several charges and has been confirmed, and any one of those charges or the finding thereon is found to be invalid, the authority having power to mitigate, remit or commute the punishment awarded by the sentence shall take into consideration the fact of such invalidity, and mitigate, remit, or commute the punishment awarded according as may seem just, having regard to the offences in the charges which with the findings thereon are not invalid, and the punishment as so modified shall be as valid as if it had been originally awarded only in respect of those offences. (C) Where a sentence passed by a court-martial has been confirmed, and is found from any reason to be invalid, the authority who would have had power to commute the punishment awarded by the sentence if it had been valid may pass a valid sentence, and the sentence so passed shall have the

> same effect as if passed by the court-martial, but the punishment awarded by that sentence shall not be higher in the scale of punishments than the punishment awarded by the invalid sentence, nor, in the opinion of the said authority, be in excess of the last-mentioned punishment.

The argument which is put forward is that, because under that rule it is provided that the authority, having power to mitigate, remit or commute the punishment awarded by the sentence, shall take into consideration in this case the fact that some of the charges were not supported, were not finally sustained, therefore there must of necessity be a mitigation, remission or commutation of the punishment awarded in this third charge relating to forgery. If that were the true construction of the rule, the result would be, I think, a manifest absurdity. It would really mean, as the Attorney-General has pointed out, that a series of absurd results, whether looked at from the point of view of the greatest punishment, or from the point of view of the lightest punishment, might follow. In my opinion, the important words here are the words "according as may seem just." It is to be remembered that these Rules of Procedure are made under and with reference to the Army Act itself, and by sect. 57 of the Army Act there are the clearest possible provisions with regard to commutation and remission of sentences. It is provided by sect. 57 (1):

> The confirming authority may, when confirming the sentence of any court-martial, mitigate or remit the punishment thereby awarded, or commute such punishment for any less punishment or punishments to which the offender might have been sentenced by the said court-martial, or if such punishment is death awarded for the offence of murder, then for penal servitude or such less punishment as in this Act mentioned, or, if such punishment is cashiering awarded for an offence under sect. 16 of this Act, then for dismissal from His Majesty's service or such less punishment as is in this Act mentioned. The confirming authority may also suspend for such time as seems expedient the execution of a sentence.

The argument is adduced with apparent seriousness, that, where more charges than one are made and one of those convictions is quashed, it necessarily follows that the maximum sentence cannot stand with reference to any other charge, it necessarily follows that the sentence passed with reference to the offence which is confirmed, where the conviction is confirmed, must be modified. I see no such provision in the Army Act. I see no such provision in the Rules of Procedure, 1926, and the result would be manifestly absurd. If the Rules of Procedure, 1926, were in this respect, on the true construction of them, or in any respect inconsistent with the provisions of the Army Act, it is quite clear that the Rules would be *pro tanto* superseded by the provisions of the Army Act. Sect. 70 (2) of the Army Act contains this proviso:

> Provided always, that no such rules shall contain anything contrary to or inconsistent with the provisions of this Act.

The conception of a sentence, which has been adduced in the argument of the applicant, is that it is, and is of necessity, a composite whole made up of several distinguishable parts, and that, if in any respect a sentence is modified, it follows that some part of the punishment must necessarily disappear, be remitted or commuted. I see no support for that remarkable contention. There is no reason at all, in my opinion, under these rules or otherwise, why a sentence passed in respect of one offence may not remain unimpaired and of full force and effect, notwithstanding that, upon review, some other convictions may at the same time have been found to be unsustainable. A

In my opinion it is perfectly obvious that this application for a writ of mandamus is wholly misconceived. It depends upon fundamental errors of construction, and, I think, therefore, the motion must be dismissed. B

Charles, J.: I agree. The question involved in this motion really is: is r. 54 mandatory? It does not, in my view, in any way conflict with the Army Act, and, if it be not mandatory, the Army Council appears to have followed meticulously the rule that was laid down for their guidance. C

It has been argued that the presence of the word "shall" in r. 54 must of necessity import a mandate. In my opinion that is quite fallacious. You must look at the whole rule in order to come to the proper conclusion whether or no the word "shall" imports a mandate, or whether, having read the whole rule, it becomes permissive in spite of the word "shall." I will read the words of r. 54 (B), although my Lord has read them because there are certain other words, in addition to those which my Lord has referred to, which, in my view, are of importance: D E

> Where a sentence has been awarded by a court-martial in respect of offences in several charges and has been confirmed, and any one of those charges or the finding thereon is found to be invalid, the authority having power to mitigate, remit or commute the punishment awarded by the sentence shall take into consideration the fact of such invalidity, and mitigate, remit, or commute the punishment awarded F

and then come these words:

> according as may seem just, having regard to the offences in the charges which with the findings thereon are not invalid, and the punishment as so modified shall be as valid as if it had been originally awarded only in respect of those offences. G

In this case, the matter coming before the Army Council, was considered by them, and as a result of their consideration, following, as I say, meticulously the duties put upon them by the rule, the following letter was written: H

> The Secretary of State for War has been advised that the convictions on the first, second, fourth and fifth charges shall be quashed, and the council have therefore directed that all record of the convictions on those charges is to be erased from relevant documents and that you are to be relieved of the consequences of the said convictions.

Now refer to the words of the rule in order to see whether they have acted properly and in accordance with the rule or not. They have to act:

> according as may seem just, having regard to the offences in the charges which with the findings thereon are not invalid.

A The letter goes on:

> In view of the nature of the third charge upon which the conviction stands, the Army Council can see no ground for interfering with the sentence passed by the court.

They are then correctly applying their minds to the rule which directs their conduct. Having considered the whole matter, having regard, as B they say, to the nature of the third charge, which is a matter that they have to regard under the rule, and looking at the justice of the matter—"according as may seem just"—they have come to the conclusion that the sentence, which was one of dismissal, should stand. I am quite unable to see that this motion has any solid foundation, and I agree C with my Lord that it should be dismissed.

HUMPHREYS, J.: I am of the same opinion, and I have nothing to add.

D *Application dismissed with costs.*

Solicitors: *Henry Mossop & Syms* (for the applicant); *Treasury Solicitor* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

E

GOODBARNE *v.* BUCK AND ANOTHER.

[KING'S BENCH DIVISION (Hilbery, J.), **October 9, 1939.**]

Insurance—Motor insurance—Third party risks—Policy issued upon proposal form containing false statements—Policy subsequently avoided by court— F *"Causing or permitting" an uninsured car to be driven—Road Traffic Act,* 1930 (c. 43) s. 35 (1).

The defendant W. E. B., with the knowledge of the defendant H. A. B., signed a proposal form for a policy to satisfy the Road Traffic Act, 1930, in the name of the defendant H. A. B. as proposer and registered owner of the van, the vehicle to be driven by W. E. B. The purchase price G of the van had been lent to W. E. B. by H. A. B., but thereafter H. A. B. had no concern with the user of the van which was employed by W. E. B. in his business. On Aug. 26, 1938, the plaintiff's husband was fatally injured by the negligent driving of the van by W. E. B. On May 12, 1938, at the suit of the insurance company, the policy was avoided by reason of misrepresentation in the proposal form. This action was subsequently brought against W. E. B. whose negligence was not denied, H and against H. A. B. on the grounds (i) that he was the owner of the van and caused or permitted it to be used when there was not in force a policy of insurance or such a security in respect of third party risks as complied with the Road Traffic Act, 1930, Part II, and (ii) that if not the owner, he caused or permitted the user of the car in breach of sect. 35 (1) of that Act:—

HELD: (i) H. A. B. was not the owner of the van and could not, therefore, have caused or permitted the driving of it.

(ii) until the policy was declared void by the court, there was for the purposes of this action, a subsisting policy of insurance in respect of the van.

[**EDITORIAL NOTE.** There is a well-settled distinction between a voidable and a void contract. It is here decided that where a policy of insurance is avoided at the suit of the insurance company after an accident has happened, it is not possible to say that there was not in existence at the time of the accident a sub- A sisting policy with respect to the motor vehicle concerned.

As to Duty to Insure, see HALSBURY, Hailsham Edn., Vol. 18, pp. 561-563, paras. 908-912; and for Cases, see DIGEST, Supp., Insurance, Nos. 3217r-3217ee.]

Case referred to: B

(1) *Monk* v. *Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194.

Action for damages for negligence causing death. The action was brought against two defendants. W. E. Buck, the first defendant, negligently drove a van and caused the death of the plaintiff's husband. C As against him negligence was admitted and judgment recovered, but, as he was in poor financial circumstances, the case proceeded against the second defendant H. A. Buck, brother of the first defendant, on the ground that he had knowingly caused or allowed the defendant to drive the van at a time when there was not in force in relation to the van D a proper policy of insurance. Having regard to certain statements in the proposal, it had been declared in an action brought by the insurance company that the company were entitled to avoid the policy. The present report only deals with the claim against the defendant H. A. Buck. The facts and arguments of the claim are fully set out in the E judgment.

C. M. Picciotto, K.C., and *D. McIntyre* for the plaintiff.

W. A. L. Raeburn for the defendants.

Hilbery, J.: On Aug. 26, 1938, about 9.30 p.m., the plaintiff's husband was knocked down and very seriously injured by a Ford van, F then driven and controlled by the defendant William Edward Buck.

The claim is put against the defendant Henry Albert Buck, in this way. It is alleged that Henry Albert Buck was in truth the owner of the van, and that he caused or permitted the user of that van on the road on the occasion in question when there was not in force in relation to the G user of that vehicle, by him or by his brother who was using it, such a policy of insurance in respect of third party risks as complied with the requirements of the Road Traffic Act, 1930. In the alternative, if it was not his vehicle, if he was not the owner, none the less he was the person who caused or permitted the user of that vehicle on the road H on the occasion in question when there was not in force in relation to that user such a policy of insurance. It is said that William Edward Buck had signed a proposal for an insurance of this vehicle, putting in the name of Henry Albert Buck as the proposer and as the registered owner of the vehicle, and had obtained a policy on the vehicle on the basis that Henry Albert Buck was the proposer and the person insured in respect of the vehicle, the vehicle to be driven by the driver named in the proposal, namely, William Edward Buck.

It is proved that in an action which was instituted by the insurance company who issued the policy based upon that proposal, BRANSON, J., on May 12, 1939, declared that that policy was avoided at the suit of the insurance company; and it is said that, as the policy was avoided in law at the suit of the insurance company, the parties were for all purposes in the position of there never having been an insurance in respect of this vehicle, either at the time when it was being driven and the accident occurred, or since it was acquired. Then it is said that Henry Albert Buck, in the circumstances, even whether he became the owner or did not become the owner, by what he did and is shown to have done, caused or permitted the user of this vehicle on the road by his brother, when there was not in force in relation to it and its user, either by him or by his brother, a policy of insurance complying with the requirements of the Road Traffic Act, 1930.

Now first of all as to whether the vehicle, on the facts shown before me, was the property or not of Henry Albert Buck, I had better say what I find as a matter of fact in that connection. William Edward Buck, was impecunious—there is no doubt about that. He had not a van for the purposes of his business. Henry Albert Buck was apparently in a better financial position than his brother. I have not any reason to doubt that his brother, William Edward Buck, went to Henry Albert Buck and asked for a loan to enable him to buy a van, and he got it. Loose phrases are used in a statement that was taken and signed by Henry Albert Buck, in which he said: "I bought the van, and it is registered in my name"; but be it observed that he says: "My own vehicles are insured by the Motor Union" two lines after saying that very thing, and drawing a distinction, I think, between what were his own vehicles, and this van, which he realised was not his own vehicle. These brothers were quite ready to act together, I think unscrupulously, so as to prevent this van being available in the case of an execution put in by the creditors of William Edward Buck and so as, if possible, to safeguard it as some sort of security for Henry Albert Buck for the loan which he had made. I think that is the common-sense inference to be drawn from what they did.

In the suit brought by the insurance company, BRANSON, J., found as a fact:

> that William Edward Buck and his brother arranged that the motor van should be registered and insured against third party risks in the name of H. A. Buck and not in the name of W. E. Buck. The scheme was that it should be registered in the name of H. A. Buck, insured in the name of H. A. Buck but should be driven by W. E. Buck in the course of and for the purposes of W. E. Buck's greengrocery business.

I entirely concur and come to the same conclusion of fact. BRANSON, J., later in his judgment, said:

> H. A. Buck's only connection with this matter, so far as the evidence before me

> discloses it, is that he had lent his brother the money with which to purchase the van. It is quite plain on the evidence that the van was the brother's van, was to be used in the brother's business and that H. A. Buck had nothing whatever to do with it.

Again, I have not the least hesitation in saying that I come to the same conclusion of fact. H. A. Buck was not in fact the owner of the van.

Now how does that affect the situation ? Of course, when the owner of a motor vehicle which, if it is to be used on the road, has to be covered by an insurance which will satisfy the requirements of the Road Traffic Act, allows it to be used on the road (he being the person having the right to prevent it from being used) by another person who is not insured, he breaks one of the statutory duties imposed upon him under the Road Traffic Act, 1930, s. 35 (1), and it has been held in *Monk* v. *Warbey* (1) that where an owner causes or permits a motor car to be driven uninsured, and the person allowed to drive it, in the course of the driving which is permitted by the owner, tortiously causes damage to another person so that that person suffers damages, and it is then shown that because the tortfeasor was allowed to drive and was uninsured, those damages are lost to and irrecoverable by the sufferer from the tort, then the sufferer can recover a like sum as the measure of what he has been unable to recover, as a result of the breach of the statutory duty which the owner of the car was under not to allow its user uninsured.

Here, the first point to observe is that in fact it is clear that Henry Albert Buck was never the owner, and it was not, therefore, for him to prevent William Edward Buck, to whom he had advanced money to enable him to buy the van, from driving the vehicle. I find nothing on the facts to show that he could, once he had lent the money and William Edward Buck had bought the vehicle, prevent William Edward Buck from driving it on the road. To say that he had lent him the money to buy it and therefore caused him to drive it, seems to me to give an entirely false meaning to the word "caused." To lend the money and thus enable a person to have a vehicle which he may or may not insure is one thing. It is quite another thing to say that by enabling him to have a vehicle which he might not insure he caused him to drive it uninsured when he did so drive it. There is in that, to my mind, a complete *non sequitur*. An act which merely enables a person to be in a position to do something which is illegal is not an act which of itself causes a person to do the illegal act. I should have thought that was too plain for words. It was not, therefore, as in *Monk* v. *Warbey* (1), as an owner that he was causing or permitting this van to be driven on the occasion in question.

It is, however, said that he none the less caused or permitted it to be driven on that occasion without a valid insurance satisfying the requirements of the Road Traffic Act, because he himself, on the statement that he has made, is shown to have lent himself to an attempt by his brother to insure it in his name, and he must have known that the result of allowing his brother to do that, when it was not really his car, was to

enable his brother to take out a policy which, it is said, was void. I am not satisfied at all that either of these brothers thought that they were obtaining a policy which was invalid. I think they thought they could validly do what they were doing. Even if I assume that they must be taken to have known that what they did in entering these answers on
A the proposal would produce only a policy which was a voidable policy, that seems to me to be a wholly different thing from saying that what they were doing was to bring about a state of affairs where there was a policy which the company would avoid and which would mean that they were driving the car from the start uninsured. It appears to me
B first of all that this policy, from the time when the proposal form was filled up, and incorrectly filled up, was voidable; but that does not mean the same thing as void. If the insurance company never elected to avoid it, it was a valid and subsisting policy. The insurance company was not bound to come to the court and elect to avoid it. I gave the
C example, in the course of the argument, of the set of circumstances where one might quite rightly suppose that an insurance company, with a policy which it saw it could avoid, and which a court would have to declare void if it came to the court, might still elect to pay the claim rather than go to the expense and bother of a law suit in order to get
D a declaration that they were entitled to avoid the policy—a small claim in the last week of the year of life of the policy. The result is that the car was being driven with a valid insurance upon it at the time of the accident, notwithstanding that it was a voidable one; and the answer here seems to be that this was a voidable policy but not a void one.
E As between the immediate parties to it, and in considering the rights and liabilities which it purported to create, when once there has been a declaration of avoidance by the court it is, of course, as though the risk had not been written between the parties. None the less, although that is the situation created with regard to the rights and liabilities as
F between the parties to what purported to be that contract, it does not necessarily mean that, as regards the Road Traffic Act, 1930, s. 35 (1), that policy must be regarded as never having been in existence at all.

The question that has to be determined under the section is whether,
G at the time when the accident happened, and the motor vehicle in question was being used, some person caused the user by another person of that motor vehicle on the road when there was not in force in relation to the user of the vehicle by that person or that other person, such a policy of insurance or such a security in respect of third party risks as complied
H with the requirements of this part of the Act. Well, first of all, it is to be observed that the words are "unless there is in force in relation to the user of the vehicle, a policy which satisfies the requirements of the Act." Therefore, what has to be looked at is this: was there at the time of the user of the vehicle a policy which was then in force? The fact that the rights which were created by that contract of insurance

were subsequently successfully avoided so far as the immediate parties to it were concerned, does not, it seems to me, prevent there having been a policy in force at the time of the user of the vehicle which is in question, when, as I have said, one remembers that, at that time, there had been no avoidance of it, and might never have been any avoidance at all if the insurance company had chosen to abide by it.

Therefore, looking at the time when the tortious act and the user in question occurred, it seems to me that it follows that there was in fact at that time a policy in respect of the car which was a policy which complied then with the terms of the Act in question, and indeed I think that to hold otherwise would have a very far-reaching effect. For example, this man, I suppose, would be liable and would have no answer to a summons in respect of every day on which it could be shown that he had driven that vehicle, when he had a certificate of insurance of the vehicle which was issued to him because of this voidable policy being in existence; and he would have no answer to a conviction in respect of every day. Moreover, I suppose the result would be, if that contention of the plaintiff here were right, that any owner to-day, who has a policy and has not the least conception that there is any ground on which the company might avoid it but none the less there exists a ground on which the company might avoid it, would find himself in the situation that equally he would, when the company did avoid it, be liable to prosecution in respect of every day that he drove the car, with that certificate in his pocket which appeared to comply with the requirements of the Act. He would be liable as well to pay out of his own pocket the damages of some third party if he quite properly had delegated the driving or let the car be driven by another person with his authority.

I am satisfied that for these reasons the claim fails as against Henry Albert Buck. It is not contended that he had any liability as the superior of William Edward Buck; it is only contended that his liability arises by reason of the fact that William Edward Buck had no valid insurance under the Act because it had been declared void, and he is impecunious, and, it is said, was caused or permitted by Henry Albert Buck to drive on this occasion. As I have said, I do not think Henry Albert Buck was the owner. I do not think that he, as owner, had caused or permitted the driving of the vehicle. I do not think he caused or permitted the driving of the vehicle because I do not think he was in any position, in relation to the vehicle, which gave him any power or right to prevent the driving of the vehicle, and the vehicle was not being driven because he had given any necessary permission, nor, in my view, can he be sensibly or logically said to have caused the user of the vehicle by William Edward Buck.

Judgment for the defendant H. A. Buck.

Solicitors: *Evill & Coleman* (for the plaintiff); *W. T. Donovan* (for the defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

DAVID ALLEN & SONS BILLPOSTING, LTD. *v.* DRYSDALE.

[King's Bench Division (Lewis, J.), **October 12, 13, 16, 17, 1939.]**

Insurance—Accident insurance—Subsidence or collapse of building—Construction of policy—Meaning of "subsidence" and "collapse."

The plaintiffs were owners of a building in London and had insured it under a Lloyd's policy against loss or damage caused by subsidence and/or collapse. The currency of the policy was from Dec. 20, 1937, to Dec. 19, 1938. As the result of a dangerous structure notice served on the plaintiffs by the London County Council on Oct. 7, 1938, it became reasonable, if not incumbent, on the plaintiffs to demolish, and they did demolish, the building. The question then arose (i) what was meant in the policy by the words subsidence and collapse and (ii) whether "collapse" could include demolition in obedience to an order of the London County Council :—

Held : (i) "subsidence" means primarily sinking in a vertical direction, but may also include settlement i.e., movement in a lateral direction.

(ii) "collapse" denotes falling, shrinking together, breaking down or giving way through external pressure, or loss of rigidity or support.

(iii) "collapse" cannot cover intentional demolition, and, as the demolition was in fact due to a settlement which occurred before the commencement of the period covered by the policy, there was no subsidence within that period.

[EDITORIAL NOTE. The insurance of buildings is common commercial practice, but reported cases as to the scope of such policies are few. The judgment in this case examines the extent of the cover provided by a standard form of policy, but the facts of the case rather narrow the scope of its application.

As to Accident Insurance, see HALSBURY, Hailsham Edn., Vol. 18, pp. 542-544, paras. 862-865 ; and for Cases, see DIGEST, Vol. 29, pp. 403, 404, Nos. 3191-3194.]

Action against a Lloyd's underwriter, sued both for his own share and as representative of the underwriters who subscribed to the policy, on a policy of insurance effected to cover in a sum not exceeding £21,000 loss or damage caused by the subsidence and/or collapse of a building. The £21,000 was apportioned £15,000 on the buildings, £4,000 on the contents of the buildings and premises, and £2,000 twelve months' rent subject to a rent clause attached. The action was in respect of insurance on the buildings and rent only. The facts and arguments are fully set out in the judgment.

W. T. Creswell, K.C., and *Frank Soskice* for the plaintiffs.

H. U. Willink, K.C., and *E. W. Roskill* for the defendant.

Lewis, J. : This is an action brought by David Allen & Sons Billposting, Ltd., against Matthew Watt Drysdale, who is an underwriter at Lloyd's, for loss under a Lloyd's policy of insurance dated Jan. 4, 1938, the defendant being sued both for his share and as representative of the underwriters who subscribed to the policy.

The policy covers the assured in a sum not exceeding £21,000 "against loss or damage caused by subsidence and/or collapse (but excluding loss or damage caused by fire and/or explosion)" in respect of a building known as 23, Buckingham Gate and 55a, Catherine Street. The £21,000 is apportioned as follows: £15,000 on the buildings, £4,000 on the contents of the buildings and premises, and £2,000, twelve months' rent, subject to the rent clause attached. The rent clause reads:

> The underwriters will not be liable for rent unless the said building be destroyed by or so much damaged by the perils insured against as to be rendered unfit for A occupation, and then only for such a proportion of the amount of twelve months' rent as may be equivalent to the time necessary for reinstating the damage sustained.

This claim extends only to the insurance on the buildings and the rent.

It is conceded that, before the plaintiffs can recover, they must show that subsidence and/or collapse occurred during the currency of the B policy, namely, between Dec. 20, 1937, and Dec. 19, 1938, and that, by reason of such subsidence and/or collapse, the plaintiffs have suffered loss or damage. The plaintiffs have undoubtedly lost their building as, in consequence of a dangerous structure notice dated Oct. 7, 1938, served upon them by the London County Council, it was, as is frankly C admitted, reasonable to demolish the building, and it has been demolished. Since then, the site has been sold by the plaintiffs.

The perils insured against are two: "subsidence and/or collapse," and I have to construe the meaning of those words. "Subsidence" means sinking, that is to say, movement in a vertical direction as opposed D to "settlement," which means movement in a lateral direction, but I am of opinion that the word "subsidence" in this policy covers both subsidence in the sense in which I have defined it, and also settlement. If, therefore, any subsidence in the above-mentioned sense occurred between the relevant dates, and if that subsidence caused loss or damage E to the plaintiffs, they are entitled to recover such loss or damage.

With regard to the word "collapse," there has been a good deal of discussion. Put shortly, it was argued on behalf of the plaintiffs that, whatever else it may or may not include, it certainly included demolition in obedience to an order of the London County Council. The defendants, F on the other hand, say that "collapse" is not an apt word to describe the intentional demolition of a building. "Collapse" in its primary meaning denotes falling or shrinking together or breaking down or giving way through external pressure or loss of rigidity or support, and I am unable to take the view that in this policy the word covers the G intentional destruction or demolition of a building by housebreakers. No authority was cited to me (indeed, I was told that there was none) to assist me in considering the word when it occurs in such a document as the present policy. The plaintiffs, therefore, are unable to bring themselves within the meaning of the word "collapse" in this policy, H and it remains to consider whether, on the facts of this case, it is true to say that the loss, if any, incurred by the plaintiffs was caused by subsidence to the building, such subsidence happening during the currency of the policy.

The building was an old building, a nice example of Georgian eighteenth century architecture, standing in a row of more or less contemporary buildings in Buckingham Gate. A surveyor who inspected it somewhat cursorily in May, 1927, when the parent company of the plaintiffs purchased it, drew attention to the fact that, although it was structurally in a reasonable state of repair, there was evidence of long-standing A settlement. In 1933 ties were put in owing, no doubt, to signs of defects in the structure, and again in 1935 work was done, such work principally consisting of bonding the party wall between Nos. 23 and 24 to the rear wall of the buildings. I am satisfied that, until this bonding took place, no bonding of any sort had ever been done. A letter, dated B May 29, 1935, from the district surveyor, was produced in which he drew attention to the defective condition of the rear wall of the premises.

In the beginning of 1938, the owners of No. 24 were minded to demolish their building and erect another on the site, and, arising out of this, the question of the party wall as between the building owners of No. 24 C and those of No. 23, the plaintiffs, became of importance. Surveyors were appointed under the London Building Acts. Operations on the party wall disclosed, by the month of May, serious defects in that wall. Amongst other things, it was found that the wall was nine inches out of plumb at the back and five and a quarter inches out of plumb at the D front and contained very serious cracks of old standing, which showed that there had been very considerable settlement.

Some years before, a storey had been added to No. 23. A portion of the party wall which had been built upon the old party wall when a new storey was added, was in excellent condition and showed no signs E of settlement, thus indicating that the party wall was out of plumb when the additional storey was built. With regard to one particular very serious crack in this party wall, it was abundantly clear that it had existed for many years and before the plaster on the No. 23 side of the wall had been put on the wall, this plaster showing no crack at all, F although, when it was stripped off at a later date, this serious crack was found behind it in the brickwork. The conditions exposed by the work on the party wall were such that the surveyor of the London County Council deemed it right to serve a dangerous structure notice dated May 13, 1938, upon the plaintiffs with regard to the party wall. The G surveyors of the owners of No. 24 were of opinion that the condition of the party wall was such as to require complete rebuilding, but maintained that the defects discovered were of long standing.

As the work of demolition of No. 24 proceeded it became evident that No. 24 was in a precarious condition, so much so that by Oct. 7, 1938, H after a warning to the owners of No. 24 that very considerable shoring would be necessary to uphold the building whilst the party wall was rebuilt, a further dangerous structure notice was served in respect of, *inter alia*, the main external walls of No. 23. By this time, many defects had been discovered, so that it was reasonable, if not incumbent upon the plaintiffs, to demolish the building.

The question for me is whether the plaintiffs can satisfy me that the obvious signs of subsidence or settlement which were discovered during the currency of the policy showed that settlement or subsidence occurred during that period or whether or not they were signs of long standing settlement or subsidence, occurring long before the period of the policy, but which only became apparent when the process of demolition of No. 24 and the repair of the party wall was undertaken.

I feel that this evidence is such as to leave me entirely unconvinced by the plaintiffs that there was any subsidence within the period of the policy.

Counsel for the plaintiffs, has argued that some subsidence must have occurred between the date of the first dangerous structure notice and the second dangerous structure notice, because, said he, the surveyor to the London County Council would not have served a second notice unless that was so ; but in view of the evidence I see no reason to draw this inference. It may be and, indeed, it was the fact that evidence of subsidence was discovered in that interval, but I am not satisfied that that evidence was evidence of fresh subsidence and that it was not evidence of longstanding subsidence and settlement. I am not satisfied that there was any subsidence within the period of the currency of the policy. Nor am I satisfied that, even if there were any slight subsidence, that subsidence was the proximate cause of the loss of the building.

Judgment for the defendant with costs.

Solicitors : *Nicholson, Freeland & Shepherd* (for the plaintiffs) ; *Hair & Co.* (for the defendant).

[*Reported by* Charles Shelley, Esq., *Barrister-at-Law.*]

SMITH, STONE AND KNIGHT, LTD. *v.* LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF BIRMINGHAM.

[King's Bench Division (Atkinson, J.), **October 4, 5, 19, 1939.**]

Compulsory Purchase—Acquisition of premises on which business of subsidiary company carried on—Right of parent company to claim compensation for disturbance and removal—Lands Clauses Consolidation Act, 1845 (c. 18), *s.* 121.

A company acquired a partnership concern and, having registered it as a company, continued to carry on the acquired business as a subsidiary company. The parent company held all the shares except five which its directors held in their respective names in trust for the company. The profits of the new company were treated as profits of the parent company, which appointed the persons who conducted the business and were in effectual and constant control. The defendant corporation compulsorily acquired the premises upon which the business of the subsidiary company was carried on, and the parent company claimed compensation in respect of removal and disturbance, but the respondents contended that the proper claimants were the subsidiary company, that being a separate legal entity :—

Held : possession by a separate legal entity was not conclusive on the question of the right to claim, and as the subsidiary company

WRONG!! was not operating on its own behalf but on behalf of the parent company, the parent company was the party to claim compensation was not operating on its own behalf but on behalf of the parent company, the parent company was the party to claim compensation.

[**EDITORIAL NOTE.** The question in this case is whether a subsidiary company has such an interest in the property upon which its business is conducted that it is entitled to receive compensation upon compulsory purchase. It would seem that in the ordinary case, there is no such right to compensation, but the question is one of fact in each case, depending upon the arrangements made between the parent and the subsidiary company.

As to Persons entitled to Compensation, see HALSBURY, Hailsham Edn., Vol. 6, pp. 39-41, para. 36; and for Cases, see DIGEST, Vol. 11, pp. 123, 124, Nos. 148-155.]

Cases referred to:

(1) *Salomon* v. *Salomon & Co., Salomon & Co.* v. *Salomon*, [1897] A.C. 22; 9 Digest 34, *11*; 66 L.J.Ch. 35; 75 L.T. 426; *revsg. S.C. sub nom. Broderip* v. *Salomon*, [1895] 2 Ch. 323.

(2) *Gramophone & Typewriter, Ltd.* v. *Stanley*, [1908] 2 K.B. 89; 9 Digest 35, *14*; 77 L.J.K.B. 834; 99 L.T. 39; 5 Tax Cas. 358.

(3) *Inland Revenue Comrs.* v. *Sansom*, [1921] 2 K.B. 492; 28 Digest 101, *612*; 90 L.J.K.B. 627; 125 L.T. 37; 8 Tax Cas. 20.

(4) *San Paulo (Brazilian) Ry. Co.* v. *Carter*, [1896] A.C. 31; 28 Digest 27, *142*; 65 L.J.Q.B. 161; 73 L.T. 538; 3 Tax Cas. 407.

(5) *Apthorpe* v. *Peter Schoenhofen Brewing Co., Ltd.* (1899), 80 L.T. 395; 28 Digest 29, *150*; 4 Tax Cas. 41.

(6) *Jones (Frank) Brewing Co.* v. *Apthorpe* (1898), 4 Tax Cas. 6; 28 Digest 26, *138*.

(7) *St. Louis Breweries, Ltd.* v. *Apthorpe* (1898), 79 L.T. 551; 28 Digest 29, *149*; 4 Tax Cas. 111.

Motion to set aside an award on the ground of technical misconduct of the arbitrator. By consent the judge decided the matter upon which the consultative opinion had been unsuccessfully sought.

The facts are fully set out in the judgment.

G. Russell Vick, K.C., and *Arthur Ward* for the applicants (claimants).

A. S. Comyns Carr, K.C., and *F. G. Bonnella* for the respondents.

Atkinson, J.: This is a motion by a firm of Smith, Stone & Knight, Ltd., whom I shall call the company, to set aside an interim award on somewhat unusual grounds. The company was the owner of a factory and a number of small houses in Moland St., Birmingham. They were paper manufacturers and carried on their business on some premises other than those in Moland St. The corporation of Birmingham desired to purchase under their compulsory powers this factory, land and cottages in Moland St., in order to build a technical college, and on Feb. 16, 1935, they served on the company a notice to treat. On Feb. 20 the company lodged a claim, and described themselves as of "84, Colmore Row, Birmingham, paper makers, waste paper merchants and dealers." They described the property, and under heading 7, where they had to specify the names of occupiers and various details, they said:

> Factory and offices let to Birmingham Waste Co., Ltd., as yearly tenants at £90 a year.

Then they gave particulars of their claim, the value of the land and premises, compensation for removal £3,000, and disturbance—the disturbance was partly the estimated additional cost of cartage of material to and from the new factory to which they would have to go—and ended with these words:

> The claim under paragraph (B) [the second part of the claim for removal and disturbance] is by the Birmingham Waste Co., Ltd., which is a subsidiary of Smith, Stone & Knight, Ltd.

On Apr. 29, 1937, an amended claim was put in, and under the first particular they added to their original description:

> and which business embodies their subsidiary company, the Birmingham Waste Co., Ltd.

Under heading 7, they said:

> Factory and offices nominally let to the Birmingham Waste Co., Ltd., which said company is a subsidiary company of Smith, Stone & Knight, Ltd., carrying on this business for and on behalf of Smith, Stone & Knight, Ltd., which said company owns the whole of the capital and takes the whole of the profits of the said subsidiary company. The subsidiary company occupies the said premises and carries on its trade as a separate department of and as agents for Smith, Stone & Knight, Ltd. The said rent was and is arranged as an inter-departmental charge and is merely a book-keeping entry.

They added to that final note, or, at any rate, in its final form it read:

> These two items of damage will accrue to Smith, Stone & Knight, Ltd., who are the principals of the Birmingham Waste Co., Ltd. The said loss will fall upon Smith, Stone & Knight, Ltd.

The parties were unable to come to terms and finally the matter was referred to arbitration. A preliminary point was at once raised, which was whether, as a matter of law, the company could claim compensation for disturbance of the business which was carried on on these premises, or whether, in law, that claim must be made by the Waste company itself. In the latter event, the corporation would escape paying compensation altogether, by virtue of Lands Clauses Consolidation Act, 1845, s. 121. That section enables purchasers to get rid of occupiers with no greater interest than a tenancy not exceeding one year, because they can give them notice and thereby terminate their tenancy, and escape paying anything to them.

The question has been put during the hearing in various ways. Was the loss which was incurred by the business which was being carried on on the premises the direct loss of the claimants, or was it, as the corporation say, a loss which they suffered merely in their capacity of shareholders in the Waste company? Again, to whom did the business in truth belong? Again, was the Waste company merely the agent of the claimants for the carrying on of the business? Were the claimants in fact carrying on the business, albeit in the name of the Waste company? All these questions were discussed during the argument.

The facts were these, and I do not think there was any dispute about them, except, possibly, as to one of them. Before Jan., 1913, the company had been carrying on their business as manufacturers. In Jan., 1913, a business was being carried on on these premises by the Waste company (which was then not a limited company, but a partnership) and the business which was being carried on was that of dealers in waste. In that month the claimants bought from the Waste company the premises and the business as a going concern, and there is no question about it that this business became vested in and became the property of the claimants. They altered and enlarged the factory and carried on the business. On Mar. 13, the claimants caused this new company, the Birmingham Waste Co., Ltd., to be registered. It was a company with a subscribed capital of £502, the claimants holding 497 shares. They found all the money, and they had 497 shares registered in their own name, the other five being registered one in the name of each of the five directors. There were five directors of the Waste company and they were all directors of the claimants, and they all executed a declaration of trust for the share which they held, stating they held them in trust for the claimants. At no time did the board get any remuneration from the Waste company. The new company purported to carry on the Waste business in this sense, that their name was placed upon the premises, and on the note-paper, invoices, etc. It was an apparent carrying on by the Waste company. I think that these two facts are of the greatest importance. There was no agreement of any kind made between the two companies, and the business was never assigned to the Waste company. There was no suggestion that anything was done to transfer the beneficial ownership of it to the Waste company. A manager was appointed, doubtless by the company, but there was no staff. The books and accounts were all kept by the claimants; the Waste company had no books at all and the manager, it is found, knew nothing at all about what was in the books, and had no access to them. There is no doubt that the claimants had complete control of the operations of the Waste company. Then other businesses were bought by the claimants, but they were not assigned to the Waste company; the Waste company just carried them on. There was no tenancy agreement of any sort with the company; they were just there in name. No rent was paid. Apart from the name, it was really as if the manager was managing a department of the company. Six months after the incorporation there was a report to the shareholders that the business was under the supervision and control of the claimants and that the profits would be credited to that company in the books, as is very often done with departments. A proportion of the overheads was debited to the Waste company and this rent, which has been referred to in the first claim of £90, was a book entry, debiting the company with that sum. There was a question as to why the company was ever formed. The functions of buying and sorting waste are different from the function of manufacturing paper, and, according to the evidence which is part of the case before me, it was thought better to have these different functions performed in a different name. The arbitrator has said in his case and in his affidavit that the reason was that the carrying on of this business would be something outside the powers of the company. He is obviously wrong about that, because the memorandum is wide enough to cover such a business, and is just as wide as that of the Waste company. It is quite clear that there was no evidence to support what he said, and I cannot think that I am bound by a finding which is shown to be wrong by the material which the arbitrator himself brings before the court.

At the end of each year the accounts were made up by the company, and if the accounts showed a profit, the claimants allocated the profit to the different mills belonging to the company, exhausting the paper profit in that way and making the profit part of the company's own profit, because allocating this profit to their different departments or different mills would have the effect of increasing their own profit by a precisely similar sum. The Waste company never declared a dividend; they never thought of such a thing, and their profit was in fact treated as the claimants' profit.

Those being the facts, the corporation rest their contention on *Salomon's* case (1), and their argument is that the Waste company was a distinct legal entity. It was in occupation of the premises, the business was being carried on in its name and the claimants' only interest in law was that of holders of the shares. It is well settled that the mere fact that a man holds all the shares in a company does not make the business carried on by that company his business, nor does it make the company his agents for the carrying on of the business. That proposition is just as true if the shareholder is itself a limited company. It is also well settled that there may be such an arrangement between the shareholders and a company as will constitute the company the shareholders' agent for the purpose of carrying on the business and make the business the business of the shareholders. In *Gramophone & Typewriter, Ltd.* v. *Stanley* (2) COZENS-HARDY, M.R., said, at pp. 95, 96:

> The fact that an individual by himself or his nominees holds practically all the shares in a company may give him the control of the company in the sense that it may enable him by exercising his voting powers to turn out the directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the directors, or make the property or assets of the company his, as distinct from the corporation's. Nor does it make any difference if he acquires not practically the whole, but absolutely the whole, of the shares. The business of the company does not thereby become his business. He is still entitled to receive dividends on his shares, but no more. I do not doubt that a person in that position may cause such an arrangement to be entered into between himself and the company as will suffice to constitute the company his agent for the purpose of carrying on the business, and thereupon the business will become, for all taxing purposes, his business. Whether this consequence follows is in each case a matter of fact. In the present case I am unable to discover anything in addition to the holding of the shares which in any way supports this conclusion.

Then FLETCHER MOULTON, L.J., said the same thing on pp. 100 and 101. Then in *Inland Revenue Comrs.* v. *Sansom* (3) LORD STERNDALE said, at p. 503:

> There may, as has been said by LORD COZENS-HARDY, M.R., be a position such

that although there is a legal entity within the principle of *Salomon* v. *Salomon & Co.* (1), that legal entity may be acting as the agent of an individual and may really be doing his business and not its own at all. Apart from the technical question of agency it is difficult to see how that could be, but it is conceivable. Therefore the mere fact that the case is one which falls within *Salomon* v. *Salomon & Co.* (1) is not of itself conclusive.

It seems therefore to be a question of fact in each case, and those cases indicate that the question is whether the subsidiary was carrying on the business as the company's business or as its own. I have looked at a number of cases—they are all revenue cases—to see what the courts regarded as of importance for determining that question. There is *San Paulo Brazilian Ry. Co.* v. *Carter* (4), *Apthorpe* v. *Peter Schoenhofen Brewery Co., Ltd.* (5), p. 41; *Frank Jones Brewing Co.* v. *Apthorpe* (6), *St. Louis Breweries* v. *Apthorpe* (7), and I find six points which were deemed relevant for the determination of the question: Who was really carrying on the business? In all the cases, the question was whether the company, an English company here, could be taxed in respect of all the profits made by some other company, a subsidiary company, being carried on elsewhere. The first point was: Were the profits treated as the profits of the company?—when I say "the company" I mean the parent company—secondly, were the persons conducting the business appointed by the parent company? Thirdly was the company the head and the brain of the trading venture? Fourthly, did the company govern the adventure, decide what should be done and what capital should be embarked on the venture? Fifthly, did the company make the profits by its skill and direction? Sixthly, was the company in effectual and constant control? Now if the judgments in those cases are analysed, it will be found that all those matters were deemed relevant for consideration in determining the main question, and it seems to me that every one of those questions must be answered in favour of the claimants. Indeed, if ever one company can be said to be the agent or employee, or tool or simulacrum of another, I think the Waste company was in this case a legal entity, because that is all it was. There was nothing to prevent the claimants at any moment saying: "We will carry on this business in our own name." They had but to paint out the Waste company's name on the premises, change their business paper and form, and the thing would have been done. I am satisfied that the business belonged to the claimants; they were, in my view, the real occupiers of the premises. If either physically or technically the Waste company was in occupation, it was for the purposes of the service it was rendering to the claimants, such occupation was necessary for that service, and I think that those facts would make that occupation in law the occupation of the claimants. An analogous position would be where servants occupy cottages or rooms for the purposes of their business, and it is well settled that if they have to occupy those premises for the purposes of the business, their occupation is the occupation of their principal. I have no doubt the business was the company's business and was being carried on under their direction, and I answer the question in favour of the claimants.

Award set aside with costs of this motion.

Solicitors: *Nash, Field & Co.*, agents for *Reynolds & Co.*, Birmingham (for the applicants); *Sharpe, Pritchard & Co.*, agents for *Sir Frank Wiltshire*, Town Clerk, Birmingham (for the respondents). A

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

R. v. GEORGE ALBERT GILLINGHAM. B

[Court of Criminal Appeal (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **October 10, 1939.**]

Criminal Law—Evidence—Admissibility—Indecent postcards found in possession of prisoner charged with gross indecency.

In a case of gross indecency postcards found in the possession of the accused may be admitted in evidence as things which a man intending to commit such an offence might well have about him, and might use as an adjunct to assist him in the commission of the offence. They are not admissible merely to show that he had a dirty mind. C

[EDITORIAL NOTE. Evidence of articles found in possession of the accused is generally admissible, but it is essential that there shall be a *nexus* between the article found and the offence charged. D

As to Evidence of Character, see HALSBURY, Hailsham Edn., Vol. 9, p. 188, para. 270; and for Cases, see DIGEST, Vol. 14, pp. 401-403, Nos. 4216-4233.]

Case referred to: E

(1) *R.* v. *Twiss*, [1918] 2 K.B. 853; 14 Digest 403, *4232*; 88 L.J.K.B. 20; 119 L.T. 680; 13 Cr. App. Rep. 177.

Appeal from a conviction at Poole Quarter Sessions on the ground of misdirection, and wrongful admission of evidence. The facts are fully stated in the judgment. F

J. T. Molony for the appellant.

W. M. Walker for the Crown.

Charles, J. [delivering the judgment of the court]: In this case, George Albert Gillingham was, together with a man named Victor Farr, G convicted at the Poole Quarter Sessions of attempted buggery and gross indecency, and he was sentenced to 6 months' imprisonment with hard labour, and he now appeals by leave of the court against his conviction.

The circumstances of the case are such that I need not deal with H them in detail. They were found guilty of the charges alleged against them, and the charges carried their own description without my further describing what these offences were.

Evidence was admitted of postcards, depicting dirty sexual acts, which were found on Gillingham and which it is said would show that he is a homo-sexual, and it is submitted that the recorder had no right to admit that evidence at all. The recorder considered this case with great care. Having adjourned it so that he might consider it overnight, he said:

> Evidence of their possession is not admissible, in my opinion, merely to indicate A the fact that he had a dirty mind; but if I can properly come to the conclusion that they are the sort of things which might well be used by a person who is guilty of such an offence as this, as an adjunct, some assistance in the commission of that offence, then I think that under the doctrine laid down by DARLING, J., in *R.* v. *Twiss* (1), they would be admissible here. In my view, these are things which a man who was guilty of an offence like this might well have about him, and might well use as an adjunct to assist him in the commission of this crime. How? By B using them to inflame the passions of the person with whom he intended, designed, to commit this crime, or to rouse his own passions for such a purpose.

It appears to the court that the recorder, when he gave his considered view, came to a perfectly correct conclusion, in the circumstances, in law. The postcards were admissible, and were admissible for the reason C he indicated.

Appeal dismissed.

Solicitors: *Peacock & Goddard*, agents for *Leslie C. Marrow*, Poole (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

D

HERSCHTHAL v. STEWART & ARDERN, LTD.

E [KING'S BENCH DIVISION (Tucker, J.), **October 20, 23, 1939.**]

Negligence—Dangerous goods—Liability of supplier—Sale of reconditioned car—Accident due to defective condition of car—Opportunity for examination of car—No expectation that opportunity would be used.

The plaintiff, who was a director of, and had a controlling interest in, a company known as U. P., Ltd., acquired on its behalf a reconditioned F motor car from a company known as S. & A. Services, Ltd. The latter company acquired the car from the defendants for the purpose of hiring it out on hire-purchase terms to U. P., Ltd. The defendants knew that the car was going to be used chiefly by the plaintiff, and they knew that it was going to be so used immediately. On the morning after the delivery of the car, before it had been driven more than a few miles, G and while it was being driven by the plaintiff, the near side rear wheel came off, whereby the plaintiff suffered damage. There was no evidence that anything had happened between the time when the car was delivered by the defendants and the time of the accident. At the time of delivery the plaintiff had signed for and on behalf of U. P., Ltd., a form of receipt stating that the car was accepted as being in good condition and as seen, tried and approved:—

H HELD: (i) the form of receipt did not protect the defendants in a claim of negligence by the plaintiff, however it might affect their contractual liability with U. P., Ltd.

(ii) the defendants were liable in negligence under the rule in *M'Alister (or Donoghue)* v. *Stevenson* (2), because, although the plaintiff was given an opportunity to examine the car for the purpose of discovering any defects, yet the defendants never anticipated that there would be any such examination.

[**EDITORIAL NOTE.** The question here discussed is whether in applying the rule in *M'Alister* (*or Donoghue*) v. *Stevenson* (2) it is a sufficient defence that there was an opportunity for intermediate examination of the property or goods sold or whether, in addition to the opportunity, it is also essential that the parties anticipated that there would be such examination. It is held that, where there was no such expectation, the plaintiff can succeed despite the fact that there was an opportunity for examination. A

As to Principle in *M'Alister* (*or Donoghue*) v. *Stevenson* (2), see HALSBURY, Hailsham Edn., Vol. 23, pp. 632-634, para. 887; and for Cases, see DIGEST, Supp. Negligence, Nos. 361 a-364 l.]

Cases referred to:

(1) *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; 36 Digest 61, *385*; 92 L.J.K.B. 389; 128 L.T. 690; *on appeal*, [1923] 2 K.B. 832. B

(2) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.

(3) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 36 Digest 8, *9*; 52 L.J.Q.B. 702; 49 L.T. 357.

(4) *Farr* v. *Butters Bros. & Co.*, [1932] 2 K.B. 606; Digest Supp.; 101 L.J.K.B. 768; 147 L.T. 427. C

(5) *Malfroot* v. *Noxal, Ltd.* (1935), 51 T.L.R. 551; Digest Supp.

(6) *MacPherson* v. *Buick Motor Co.* (1916), 217 N.Y. 382.

(7) *Stennett* v. *Hancock and Peters*, [1939] 2 All E.R. 578; Digest Supp.

(8) *Earl* v. *Lubbock*, [1905] 1 K.B. 253; 36 Digest 63, *408*; 74 L.J.K.B. 121; 91 L.T. 830.

(9) *Kubach* v. *Hollands*, [1937] 3 All E.R. 907; Digest Supp. D

(10) *Dransfield* v. *British Insulated Cables, Ltd.*, [1937] 4 All E.R. 382; Digest Supp.

(11) *Brown* v. *Cotterill* (1934), 51 T.L.R. 21; Digest Supp.

(12) *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85; Digest Supp.; 105 L.J.P.C. 6; 154 L.T. 18.

E

Action for damages (i) for negligence of the defendants in the reconditioning of a motor car whereby the plaintiff suffered injury, loss and damage, (ii) for negligence and/or breach of statutory duty in handing to the plaintiff in a dangerous and unroadworthy condition a car which had been reconditioned by the defendants for the express F purpose of being driven on the highway, the defendants then well knowing that the same would forthwith be driven by the plaintiff, and that the plaintiff would continue to drive the same on the highway, whereby the plaintiff suffered injury, loss and damage. The facts are fully set out in the judgment. G

R. E. Borneman for the plaintiff.

Gilbert H. Beyfus, K.C., and *W. H. Moresby* for the defendants.

Borneman: The fact that the wheel came off shows negligence in reconditioning, and so the plaintiff is entitled to recover: *M'Alister* (*or Donoghue*) v. *Stevenson* (2) and *Stennett* v. *Hancock and Peters* (7). H Alternatively, there was a breach of statutory duty: Motor Vehicles (Construction and Use) Regulations, 1937, reg. 67.

Beyfus, K.C.: I refer to *M'Alister* (*or Donoghue*) v. *Stevenson* (2), *Earl* v. *Lubbock* (8) and *Dransfield* v. *British Insulated Cables, Ltd.* (10). *M'Alister* (*or Donoghue*) v. *Stevenson* (2) applies only if there is no reasonable possibility of examining the goods. It does not say that there must be a reasonable probability that they will be examined.

Tucker, J.: The defendants are a well-known firm of motor car engineers and distributors, and on July 11, 1938, they supplied to a company called Utility Products, Ltd., a reconditioned Morris car. The man who actually took delivery of the Morris car was the plaintiff, Mr. Herschthal, who was a director of, and had a controlling interest in, Utility Products, Ltd. The car was supplied pursuant to an order form signed by the plaintiff on behalf of Utility Products, Ltd., in which he requested the defendants to supply, or procure to be supplied, a Morris car as described in that order form which was stated to have been:

> . . . seen, tried and approved by me on the usual hire-purchase agreement of the terms of which I am aware.

That was an application to be supplied on hire-purchase terms with a Morris motor car, signed by the plaintiff for and on behalf of Utility Products, Ltd. This motor car was subsequently supplied through hire-purchase arrangements—that is to say, through a company called S. & A. Services, Ltd., which acquired the motor car from Stewart & Ardern, Ltd., and hired it out on hire-purchase terms to Utility Products, Ltd. Before taking delivery of this motor car, as he did on behalf of the company on July 11, the plaintiff had seen it and discussed the price, and he had, I am satisfied, two trial runs in the car, on one of which there had been some question with regard to the plugs needing attention. That matter was apparently rectified, there was some adjustment made in the price, and eventually, as I have said, he took delivery on July 11. In taking delivery, the plaintiff signed a receipt for the car, describing it and stating that it was in good condition and that it had been seen, tried and approved. That was again signed on behalf of Utility Products, Ltd., by the plaintiff.

On the occasion when the plaintiff took delivery of it, a servant of the defendant company actually drove him from Golders Green, where the car was supplied, to the plaintiff's flat, which was some two or three miles distant. That was in the afternoon or evening of July 11. The car was driven by the defendant company's servant, and there is no evidence that on that trip there was anything to arouse suspicion with regard to the condition of the car, or to cause any anxiety to anybody at all. The car was left by the plaintiff in the courtyard outside the block of flats until next morning (this was summer), and at about 7 a.m. next morning he took it out to go out on business, I think. He was intending to use the car very largely in connection with his business as a director of this company, Utility Products, Ltd., and I find that the defendants, when they supplied this car to Utility Products, Ltd., knew that the car was going to be used, and largely used, by the plaintiff, and knew that it was going to be used by him forthwith. He took the car out at 7 a.m., and, after going quite a few miles, he had occasion to turn round, and, after doing so, the near rear wheel of the car came off. He managed to steer the car in such a way that he did not actually run into anything, and eventually he came to a standstill with the hub of the car resting on the kerb of the road. The accident was actually seen by a gentleman with some experience of these matters, who is now employed as an aircraft inspector, and he said the car was quite slowly turning a corner at about 10 to 12 miles an hour, and half-way round the corner the wheel came off. The car went zigzagging, nearly hit a "Keep left" standard, and appeared to be coming towards him. He had to jump out of the car in which he was and go and pick up the wheel. Then he examined the nuts, and the threads were stripped, and he came to the conclusion, from his inspection, that the nuts had not been tightened up properly for some time, and that this was apparent from the condition of the threads, the nuts and the wheel.

First of all, it is clear that the claim for breach of warranty must fail, because there was no contract between the defendants and the plaintiff, and counsel for the plaintiff very early in the case abandoned that branch of the claim. However, for similar reasons I do not think that the defendants can place any reliance on the form of receipt which was signed by the plaintiff on behalf of Utility Products, Ltd., stating that he received it in good condition and as seen, tried and approved. I think that the effect that that might have had on any contractual liability as between Utility Products, Ltd., and the defendants is another matter, but I do not think that it can protect the defendants from a claim founded in negligence by the plaintiff, provided that he can establish that the defendants owed him a duty and that they had been negligent in the performance of that duty. Counsel for the plaintiff put his case in two ways with regard to negligence. He had included in his claim a claim based upon breach of a statutory duty which he said arose under the Road Traffic Act, 1934, s. 8, and the Motor Vehicles (Construction and Use) Regulations, 1937, reg. 67. In his argument, he conceded that, unless there was negligence, he could not rely solely on the breach of statutory duty. I am afraid I have failed to appreciate that part of his argument. It seems to me that, if he can establish negligence—and that presupposes the existence of a duty by the defendants to the plaintiff—then he is entitled to succeed, and that his case cannot be made any worse or any better by coupling with that part of his claim an allegation that there has been a breach of this regulation or section. If, on the other hand, there is no duty owed, then he will be thrown back upon this section and these regulations, and, in that event, he concedes that he cannot succeed in view of the decision in *Phillips* v. *Britannia Hygienic Laundry Co.* (1). I am afraid I have not followed that part of this argument, and in my view this case rests upon the question of negligence alone. The sole question is whether or not the plaintiff can bring this case within the four corners of the decision of the House of Lords in *M'Alister* (*or Donoghue*) v. *Stevenson* (2).

Before dealing with that case and other cases that have been decided subsequently, I should have to say that I am satisfied that, if there was any duty owed in law by the defendants to the plaintiff, then, on A the facts of this case, there has clearly been a breach of that duty. The facts that I have described have not been contradicted by any evidence called by the defendants, and I think it followed from the evidence either that this wheel must have been fixed in a negligent way or that there had been negligent failure properly to overhaul the car in the B process of reconditioning. I think the facts of the case really speak for themselves. If the wheel of a car comes off at 7 a.m. and it is found in the condition in which this one was found, it must follow that there has been negligence somewhere in the servants of the firm who sent it out the evening before, when it should have been safe and fit for the road.

C I am also satisfied that, when the defendants supplied the car to the plaintiff, the last thing they ever contemplated was that there was going to be any such examination of this car by the plaintiff or by anybody else as would be likely to reveal a defect of this kind before 7 a.m. the next morning. In my view, the fact that there had been trial runs D earlier throws no light on the matter at all. There had never been any examination of the kind that would reveal a defect of this sort, and it did not become apparent on any of the trial runs, nor when the car was being driven to the plaintiff's flat on the occasion of delivery. I am satisfied that no intermediate examination was ever within the E contemplation of the parties. On the other hand, there did exist opportunity for examination if anybody had desired to make such examination. Instead of sleeping in his bed that night, the plaintiff might have spent the night in overhauling the motor car, and in that sense there was opportunity for examination. Similarly, he might conceivably have F handed it over to another firm of engineers to test. However, although there was that opportunity for examination, I am satisfied that such examination was never contemplated by the defendants or by the plaintiff himself. That is to say, it was never contemplated that there would be any intermediate examination between the time of delivery and the G time when the accident actually happened. Totally different considerations would arise in the case of an accident happening after a lapse of weeks or months, or after the car had been driven a considerable mileage. That is not the case with which I have to deal.

Put shortly, therefore, it seems to me that the real issue in the case H is this—is the proper test to be applied in a case of this kind whether there was an opportunity for an intermediate examination, or is the test whether any intermediate examination could reasonably be anticipated by the defendants? If the defendants are excused from that liability by the mere fact that an intermediate examination could have taken place, then, on the facts of this case, they should succeed. If, on the other hand, I hold that they could not and would not reasonably anticipate any intermediate examination, if that is the test, then I think that the plaintiff is clearly entitled to succeed.

Which is the right test ? When one looks at *M'Alister* (*or Donoghue*) v. *Stevenson* (2) itself, one has to remember that it is the principle laid down by the case that one has to observe, and any actual words used A which were not strictly applicable to the facts of the case and the discussion should not limit the interpretation to be put upon the principle which appears to lie at the root of the case. The statement of the law by Lord Atkin and Lord Macmillan has been so often referred to that I need hardly refer to that, but I do once again refer to the general B proposition of Lord Atkin, at p. 580 :

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour ? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are C called in question.

That is not intended to be an exhaustive definition, and has to be interpreted in the light of the facts to which Lord Atkin was referring. Then, at pp. 581, 582, when he is referring to circumstances in which one man becomes the neighbour of another man so as to owe him a duty, D referring to what Lord Esher, M.R., had said in *Heaven* v. *Pender* (3), he quotes his words, and towards the end of the quotation Lord Esher, M.R., had stated, at p. 510 :

> It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would E be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property.

Then Lord Atkin goes on, at p. 582 :

> I draw particular attention to the fact that Lord Esher, M.R., emphasises the F necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship . . . I think the judgment of Lord Esher, M.R., expresses the law of England.

G

Later in his opinion, he says, at p. 599 :

> . . . if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that H the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is to be observed that, when he was quoting from Lord Esher, M.R., with approval, the words were " . . . used at once before a reasonable opportunity of inspection," and, when he quoted those words with approval, at p. 582, in dealing with the proximate relationship, he went on to use the words:

> . . . which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed.

Those are slightly different words from the "reasonable opportunity A for inspection," and in the concluding part of his opinion he talks about no reasonable possibility of intermediate examination. In *Donoghue's* case (2), it was not necessary for the House of Lords to draw any distinction between the reasonable possibility of intermediate examination and the possibility that the defendants would reasonably anticipate B that there would be such intermediate examination. The matter did not arise. It was obvious on the face of the case—an opaque ginger-beer bottle put on the market by the defendants—that there would not be any intermediate examination, nor would the defendants ever have supposed that there would be. It was not, therefore, in the least C necessary for any of their Lordships in that case to apply their minds to that particular distinction, which might possibly arise in other cases. They were laying down the general principle about liability. They were pointing out the necessity for the existence of this proximate relationship and referring to the way in which the chain might in different D cases be broken. In that particular case it was only expressed to apply to the manufacturer of goods. In subsequent cases, it has been held to cover also the case of people who were not manufacturers but were in one or more instances suppliers or repairers of goods.

I think I need not read from the opinion of LORD MACMILLAN. In E the well-known passage which has been read to me by counsel for the defendants, he states the position as he found it. I think that it is my duty to endeavour to ascertain what I consider to be the principle laid down in this case. I do not find it helpful to take the literal words used by LORD ATKIN in one passage—"no reasonable probability of F intermediate examination"—and say that, because he used those words in a case where it was not necessary to distinguish between opportunity for examination and reasonable anticipation that examination would take place, one should regard those words as exhaustive. I think that that would be putting too narrow an interpretation upon the decision G in that case. I feel fortified in that view by reference to what GREER, L.J., said in *Farr* v. *Butters Bros. & Co.* (4). In that case it seems to me that it was clear that the plaintiff could not possibly have succeeded, because the injured man, who lost his life, had in fact discovered the existence of the defect before he suffered his injury, but in that case H *Donoghue's* case (2) was discussed and considered by the Lords Justices, and it is to be observed, and given the greatest weight to, that SCRUTTON, L.J., does seem to have taken the view that *Donoghue's* case (2) proceeded on the basis of the absence of opportunity of examination. However, once again it was not necessary for the decision in *Farr* v. *Butters Bros. & Co.* (4) to come to a conclusion upon that point, because it was clear that in any event the claim could not be brought within the four corners of *M'Alister* (*or Donoghue*) v. *Stevenson* (2). In considering the danger of taking isolated sentences in a judgment and building upon them, it is helpful to see the way in which GREER, L.J., put it, at p. 619:

> As I read the judgment of the House of Lords, the fact that in that case the defect was not discoverable by such a reasonable examination as ought to be anticipated distinguishes the case from this one.

There he is carefully stating the way in which he reads the decision of the House of Lords, and he is describing it as being based upon the defect of not being discoverable by such reasonable examination as ought to be anticipated. Having used those words, after quoting LORD ATKIN, he goes on to say, at p. 620:

> That is the principle on which he based his judgment. I understand him to mean that if the manufacturer had left a reasonable possibility of examination, either through an intermediate person or by its use, there would be no liability, because there would be no duty.

Thus in succeeding pages he is putting the decision in two rather different ways. In one case he is basing it on the possibility of intermediate examination, and in the other he is talking about the defect not being discoverable by a reasonable examination that ought to be anticipated. That is the particular point I have to decide in this case, which of those is the proper test, and it shows, to my mind, how dangerous it is to fasten upon a sentence of that kind in this particular judgment, and similarly in the opinion of LORD ATKIN, when the framer was not applying his mind to the precise question. It seems to me that in this case I have to decide which was the right way of stating the decision—that stated by GREER, L.J., at p. 619, or that stated by him at p. 620.

There have been one or two decisions by courts of first instance that assist this matter. First of all, I should refer to *Malfroot* v. *Noxal, Ltd.* (5), a decision of LEWIS, J. In that case, the male plaintiff was the owner of a motor cycle to which a few days previously the defendants had fitted a sidecar. He was driving the combination along a public road and the sidecar became detached from the motor cycle. Both the male plaintiff and the female plaintiff, who was the passenger in the sidecar, sustained personal injuries, and the headnote states, at p. 551:

> Held, that the defendants were guilty of negligence in fitting the sidecar to the motor cycle, that they were liable to the male plaintiff in contract and in tort, and to the female plaintiff in tort.

Then *M'Alister's* case (2) was considered. In the statement of facts, it appears that:

> . . . in the middle of May, 1934, the defendant fitted a side-car to Mr. Syer's motor-cycle, and on May 20, while Mr. Syer was driving the combination at Snell's Corner, Petersfield, Hants, with Mrs. Malfroot as a passenger in the side-car, the side-car came away from the motor-cycle and both the plaintiffs were injured.

In giving judgment, LEWIS, J., said that the case was an extremely

difficult one, and he was satisfied that the male plaintiff had a claim for breach of warranty, and that, on the authority of *M'Alister's* case (2), the defendant owed a duty to the passenger in the sidecar. According to the report in the Times Law Reports, LEWIS, J., is stated to have said that "he adopted the words of LORD MACMILLAN," which are therein set
A out. When one looks at the report of *M'Alister (or Donoghue)* v. *Stevenson* (2), it appears that the words quoted by LEWIS, J., were not the words of LORD MACMILLAN himself, but were a quotation by LORD MACMILLAN from the judgment of CARDOZO, J., in the *American Buick* case (6), which LORD MACMILLAN set out as part of the history of these
B cases without saying whether or not he expressly approved of it. LEWIS, J., went on to say that in his view the sidecar was to be used without new tests, and he found that it was not properly fitted. There LEWIS, J., was not invited to distinguish between opportunity for examination and reasonable expectation that there would be an
C examination, but he deals with the matter by the phrase that the sidecar was to be used without new tests. Although he was not applying his mind, apparently, to the possible distinction, I think it must have been a case in which there would have been opportunity for intermediate examination, and I cannot help thinking that, although he was not,
D as I have said, applying his mind to this possible distinction, those words, on the facts of this case, are more consistent with there having been no reasonable anticipation that there would be examination than with the fact that the judge could have held that there might in fact have been an opportunity for such examination. However, the case is
E one in which the judge found that the principle of *M'Alister (or Donoghue)* v. *Stevenson* (2) applies to the repairer of an article, and is not confined solely to the manufacturer.

Then there has been a recent decision of BRANSON, J., in *Stennett* v. *Hancock and Peters* (7). That was also a case of repair. The headnote
F is as follows:

> The owner of a motor lorry took the wheel of the lorry, the flange of which had come off, to a motor repairer, with instructions to re-assemble it. The repairer's assistants re-assembled it and replaced it on the lorry, and the lorry-owner's servant drove the lorry away. An hour or two later, the flange came off while the lorry was being driven on the highway by the lorry-owner's servant, and, bowling along the road, it mounted the pavement and hit the female plaintiff,
> G injuring her. There was no evidence that anything had happened between the time when the lorry was taken out of the garage and the time of the accident which might have caused the wheel to become dislodged:—
>
> HELD: (i) following *Phillips* v. *Britannia Hygienic Laundry Co.* (1), the lorry-owner having entrusted the repair of the lorry to a competent repairer, he was not liable for either negligence or nuisance to a person who suffered injury upon the road by reason of the competent repairer having been negligent.
>
> H (ii) the lorry-owner, or the person who was going to take the vehicle on the road, was not under a duty to ascertain for himself, in so far as his capabilities allowed him to do so, whether the competent repairer had competently repaired the lorry.
>
> (iii) following *M'Alister (or Donoghue)* v. *Stevenson* (2), and distinguishing *Earl* v. *Lubbock* (8), the repairer was liable to the person who suffered injury on the road as a result of his negligence, as he was in the same position as that of the manufacturer of an article sold by a distributor in circumstances which prevented the distributor or ultimate purchaser or consumer from discovering by inspection any defect in the article.

On the facts of that case as set out in the judgment of BRANSON, J., at p. 582, it appears that the lorry had been driven away, that there was a dispute as to whether it was driven directly from the garage to the place where the accident happened or whether, before it got to the place where the accident happened, it had been driven around the town for an hour or so. In the view of BRANSON, J., that was really immaterial. It **A** would appear, therefore, that this was a case where it was possible that the owner of the lorry might have examined the wheel after the repair had been carried out before putting the vehicle on the road. There was nothing to prevent his doing it, but it was not to be anticipated by any reasonable person that he would do any such thing. In giving judgment **B** on that part of the case, BRANSON, J., at p. 582, refers to *Donoghue's* case (2), and he summarises his view of *Donoghue's* case (2) by saying, at pp. 582, 583 :

> In that case, the manufacturer of an article which was sold by him to a distributor, in circumstances which prevented the distributor or the ultimate purchaser or **C** consumer from discovering by inspection any defect in the article, was held to be under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article was free from defect likely to cause injury.

He puts it, therefore, as being " in circumstances which prevented the distributor or the ultimate purchaser from discovering by inspection." There, again, he must have been using words which could not have been **D** taken quite literally, because there was nothing which the repairers did in the case with which he was dealing which would have prevented the owner of the lorry from discovering any defects by inspection. However, he does go on to say that the repairers—that is to say, the defendants—knew that the lorry was being repaired for the purpose of being used on **E** the road. They knew that, if it was not repaired with due care, in all probability somebody would be injured, and the judge states that the first defendant knew the second defendant was not going to take the wheel off or submit it to any scrutiny to see whether the work had been properly done. I think that that sentence probably meant no more **F** than that he knew that the second defendant could not reasonably be expected to examine the wheel or to submit it to any scrutiny. There may have been some particular evidence that the second defendant was not going to, or stated that he was not, but I can find no trace of that in the case, and I think that the words are more likely to mean that the **G** defendant could not reasonably expect that the second defendant was going to make any examination. The judge goes on to explain his reasons for finding the defendant liable, and he also distinguishes this case from *Earl* v. *Lubbock* (8). I will refer to that matter at a later stage. Those two cases show the view taken by LEWIS, J., and by BRANSON, J., **H** and I respectfully agree that the decision in *Donoghue's* case (2) is not intended to be limited only to manufacturers of goods, and that it applies in a proper case to the repairer of an article, subject to this question which I have to decide as to the intermediate examination. I do not think, as I have said, that either of those two cases deals expressly with the points with which I have to deal. I think the point arises only inferentially, in that I think that in both those cases there must have existed the possibility of intermediate examination, though in neither case do I think that the defendant could reasonably have anticipated that there would be such intermediate examination.

The two cases which throw some light upon the matter which I have to decide at present are, in my view, *Kubach* v. *Hollands* (9) and *Dransfield* v. *British Insulated Cables, Ltd.* (10). In *Kubach's* case (9), the facts are that a little girl had been injured during a science lesson at a school by the explosion of some chemicals. Those chemicals had been improperly compounded, and that was the cause of her accident, as a result of which she either lost her eye or suffered some serious injury to one of her eyes. She brought the action against the headmistress of the school for breach of contract and negligence, and against the retail chemist who supplied the school with those chemicals. Against the headmistress the action failed, on the ground that there had been no breach of contract or negligence, because it could not be expected that the headmistress would analyse, or cause to be analysed or inspected, chemicals which she purchased from reputable chemists ; but there had been an interval of time during which it would have been perfectly possible for her to have caused an examination or an analysis of these powders to have been made. The claim succeeded against the second defendant—namely, the retail chemists—on the basis of *Donoghue's* case (2), that is to say, on the basis that, although they were not manufacturers, they were people who had put upon the market dangerous goods, goods which had become dangerous owing to their mixture, and they were liable to a third party—namely, a little girl who was injured thereby. It is to be observed, however, that there was, as I have said, ample intervening opportunity for examination after the supply of the chemicals by the retail chemists to the headmistress of the school. None the less, although that point was not discussed, the whole case proceeded upon the basis that they were liable if they had been careless : *M'Alister* (*or Donoghue*) v. *Stevenson* (2). I think that, if LORD HEWART, L.C.J., had taken a different view of *Donoghue's* case (2), he would never have allowed the case against the second defendant to go to the jury. This case is actually reported in the Times Law Reports on the part of the case in which the second defendant claimed over by way of third-party proceedings against the wholesale chemists who had supplied them with these chemicals, and, in giving his judgment, LORD HEWART, L.C.J., deals with the main claim by the plaintiff against the first two defendants only as part of the history of the matter. Curiously enough, in considering the case as between the second defendants and the third parties, LORD HEWART, L.C.J., did have to consider *M'Alister* (*or Donoghue*) v. *Stevenson* (2), but he does not expressly in this judgment give any opinion with regard to the applicability of *Donoghue's* case (2) to the plaintiff's claim against the second defendants. That had been disposed of some days earlier before a jury. If LORD HEWART, L.C.J., had thought that the existence of the opportunity of examination by the headmistress had broken the chain or *nexus* between the retail chemists and the little girl and was sufficient to exclude them from liability, he could never have allowed the case to go to the jury ; but, of course, it was a case where nobody could reasonably have expected the headmistress to make this examination, and the retail chemists no doubt could not reasonably have thought that any such intermediate examination would take place. On that view of the case, the decision is quite easy to follow and understand.

As against that, we have *Dransfield's* case (10), where HAWKE, J., had to decide this very point—namely, whether the test was the opportunity for examination or the reasonable anticipation that examination would take place—and he, having considered *Donoghue's* case (2) and the more recent cases, came to the conclusion that the proper view was that the defendants were excused from liability, because there was an opportunity of intermediate examination of the bull-ring by the corporation before user by their employee, and that tests could have been made by the corporation which would have disclosed the defect, and he considered that the defendants were not liable. In that particular case, the bull-ring, which had been made by the defendants, and which the judge said had been negligently made, assuming there was a duty, had been in the possession of the Bournemouth Corporation for some twelve months before the accident, and the corporation had in their possession certain implements which would have been suitable for testing the bull-ring, but nobody suggested that the defendants or the reputable makers of these bull-rings would in fact have expected the corporation to make any test. However, the judge came to the conclusion that the existence of the possibility of intermediate examination broke the chain or prevented that existing proximity which would impose a duty upon the defendants. It is to be observed that in giving judgment he said, at p. 387 :

> It was submitted that certain more recent cases—*Brown* v. *Cotterill* (11), *Malfroot* v. *Noxal, Ltd.* (5), and *Kubach* v. *Hollands* (9)—in some way showed that the decision in *M'Alister* (*or Donoghue*) v. *Stevenson* (2) had been modified so as to show that Mr. Tucker's contention was right in law. If those cases are inconsistent with my view of *M'Alister* (*or Donoghue*) v. *Stevenson* (2), I must not accept them. I must decide this case on my view of what *M'Alister* (*or Donoghue*) v. *Stevenson* (2) decides.

It seems to me that in the present case I have to do exactly what HAWKE, J., had to do in *Dransfield's* case (10). That is to say, taking all the assistance that I can obtain from such subsequent decisions, I have to apply my view of the decision in *M'Alister* (*or Donoghue*) v. *Stevenson* (2) to the facts of the case before me. Frankly, I find it difficult to reconcile the results of *Dransfield's* case (10) with *Kubach's* case (9), because, in *Kubach's* case (9), there was ample opportunity for intermediate examination, in the same way as there was in *Dransfield's* case (10), but in neither case would any reasonable person have expected such intermediate examination to take place before the accident in question. I prefer what I think was essential to the result of *Kubach's* case (9)—that is to say, that the mere existence of the opportunity for examination is not sufficient to break the chain or destroy the proximate relationship. I think that *Donoghue's* case (2) ought not to be so limited as to be confined only to the precise words used by LORD ATKIN in the concluding part of his opinion, which I have already pointed out were not necessary for the decision in that particular case. I think that one has to look at the whole basis of the judgment and apply it to the facts of the particular case.

In this case, in my view, the defendants were the plaintiff's neighbour in law within the definition by LORD ATKIN. I think that they were very immediate neighbours. They were supplying a dangerous article to a person with whom they were in actual contact. He was not some ultimate person or user who might have been envisaged. He was an actual man, with whom they were dealing in flesh and blood, so to speak. They were supplying his company, through him, with a dangerous vehicle, knowing that it was going to be used forthwith by that particular man. In my view, there was a very close proximity or relationship existing between the plaintiff and the defendants, which imposed a duty upon the defendants to take reasonable care to see that the article which they were delivering to the plaintiff, knowing that he was going to put it immediately on the road, was not in such a condition that a wheel might rapidly fly off, possibly causing very severe and grave damage.

I have taken a very long time in leading up to that decision, but, in my view, the case is a very difficult one, because it is clearly not my duty to extend the law in any way whatever. My duty is merely to decide what I think is the law as already laid down in previous cases. In reviewing the cases, there is one case to which I have not referred, and that is *Grant* v. *Australian Knitting Mills, Ltd.* (12), which came before the Privy Council. It will be remembered that that was a case where a man had purchased some underpants from retailers, and as a result of wearing them he suffered some illness, and he sued the manufacturer. In that case, there was some discussion as to whether or not there had been some intervening facts which would preclude the defendants from liability in any event. That is to say, it was clear that the plaintiff might have washed these pants before wearing them and that thereby the defendants might have been absolved from liability. I think that it was even suggested that he had been guilty of negligence in not so doing. In considering that case in relation to the present case, I think that it is to be observed that on those facts—namely, the admitted fact that the pants might have been washed before user—that was a case where, although intermediate examination could not perhaps have taken place, or could not have been said reasonably to have been expected, there was, at any rate, ample opportunity for something to happen which would have resulted either in the discovery of the defect or in something which would have prevented the injury. I think that, when one looks at *Grant's* case (12), it tends to support my view that it would be putting a narrow interpretation on *Donoghue's* case (2) to say that it applies only where there can be no possible intermediate examination. I think that the whole trend of *Grant's* case (12) is contrary to that very limited view of *Donoghue's* case (2). In *Grant's* case (12), the defect, of course, could no more be seen by the naked eye than apparently the snail could be seen in the opaque ginger-beer bottle, but there was no kind of difficulty in applying to the pants a process which would not have destroyed them, but which would have prevented the accident from happening. None the less, the defendants in that case were held to be liable.

Accordingly, I think that the defendants are liable in this case, and I think that they are liable on the basis that they were the plaintiff's neighbours in law and were supplying this dangerous article for his user when, and in circumstances in which, they did not anticipate and could not reasonably have anticipated, that there would be any such intermediate examination as would be likely to reveal a defect such as existed in this motor car.

Judgment for the plaintiff for £88 5s.

Solicitors: *Oscar Mason & Co.* (for the plaintiff); *Goulden, Mesquita & Co.* (for the defendants).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

Applied. CUMMINGS *v.* LONDON BULLION CO., LTD. [1952] 1 All E.R. 383.

MADELEINE VIONNET ET CIE. *v.* WILLS.

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.JJ.), **July 24, 25, October 12, 1939.**]

Money—Currency—Rate of exchange—Payment for goods sold—Distinction between payment in foreign country and payment into court in this country.

In Sept., 1936, the defendant became liable to pay the plaintiffs the sum of 8,100 francs for goods supplied in Paris. At that time the equivalent in English currency was £105 6*s.* 4*d.* On Dec. 1, 1938, the plaintiff issued a writ in respect of that debt, claiming the sum of £105 6*s.* 4*d.* The defendant paid into court the sum of £65 6*s.* 5*d.*, the equivalent in English currency of 8,100 francs at the date of the writ:—

HELD: the plaintiffs were entitled to £105 6*s.* 4*d.*, the English equivalent of the debt at the time the debt became payable.

[**EDITORIAL NOTE.** This case considers the curious position of a person sued in this country for a debt due in a foreign country. The debtor can apparently make payment in the foreign country by paying the amount of the debt in that currency. If, however, he chooses to satisfy the demand by payment into court in this country, he must pay the equivalent amount in English currency calculated at the rate prevailing on the day the debt became payable.

AS TO RATE OF EXCHANGE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 173, 174, para. 251; and FOR CASES, see DIGEST, Vol. 35, pp. 172-176, Nos. 31-63.]

Cases referred to:

(1) *Société des Hôtels Le Touquet-Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451; 35 Digest 173, *36*; 91 L.J.K.B. 288; 126 L.T. 513.

(2) *Deutsche Bank Filiale Nurnberg* v. *Humphrey* (1926), 272 U.S. Rep. 517.

(3) *S.S. Celia* v. *S.S. Volturno*, [1921] 2 A.C. 544; 35 Digest 174, *39*; 90 L.J.P. 385; 126 L.T. 1.

(4) *Di Ferdinando* v. *Simon, Smits & Co., Ltd.*, [1920] 3 K.B. 409; 35 Digest 175, *52*; 89 L.J.K.B. 1039; 124 L.T. 117.

(5) *Re British American Continental Bank, Ltd., Goldzieher & Penso's Claim*, [1922] 2 Ch. 575; 35 Digest 175, *53*; 91 L.J.Ch. 760.

(6) *Re British American Continental Bank, Ltd., Lisser & Rosenkranz's Claim.* [1923] 1 Ch. 276; 35 Digest 175, *54*; 92 L.J.Ch. 241; 128 L.T. 727.

(7) *Re British American Continental Bank, Ltd., Credit General Liegeois' Claim*, [1922] 2 Ch. 589; 35 Digest 174, *46*; 91 L.J.Ch. 765; 127 L.T. 284.

(8) *Peyrae* v. *Wilkinson*, [1924] 2 K.B. 166; 35 Digest 174, *48*; 93 L.J.K.B. 121; 130 L.T. 511.

(9) *Re Chesterman's Trusts, Mott* v. *Browning*, [1923] 2 Ch. 466; 35 Digest 169, *12*; 93 L.J.Ch. 263; 130 L.T. 109.

(10) *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581; 35 Digest 176, *57*; 67 L.J.Ch. 304; 78 L.T. 432.

APPEAL by the plaintiffs, a firm of French dressmakers carrying on business in Paris, from an order of His Honour JUDGE DUMAS in the Westminster County Court, dated Mar. 23, 1939.

H. Wynn Parry, K.C., and *P. R. Hollins* for the appellants.

G. Thompson for the respondent.

CLAUSON, L.J. (delivering the judgment of the court): In Sept., 1936, the defendant became liable to pay to the plaintiff firm, a French firm carrying on business in Paris, the sum of 8,100 francs for clothes supplied to the defendant in Paris. At the time when, by agreement of the parties, the debt was treated as becoming due—namely, Sept. 24, 1936—the rate of exchange between Paris and London was such that the equivalent of 8,100 francs was £105 6*s.* 4*d.* in British currency. Notwithstanding repeated demands, the defendant failed to pay. On Dec. 1, 1938, the plaintiffs sued the defendant in the High Court. On Dec. 19, 1938, the defendant paid into court £65 6*s.* 5*d.*, which was supposed to be the equivalent of 8,100 francs at the rate of exchange ruling at the date of the writ. However, owing to a miscalculation, this sum was in fact somewhat greater than the exchange value of 8,100 francs, both at the date of the writ and at the date of the payment into court and at the date (Jan. 31, 1939) when the master ordered payment out of that sum to the plaintiffs. When the £65 6*s.* 5*d.* was ordered to be paid out to the plaintiffs, it appears that the plaintiffs insisted that they were entitled to the larger sum of £105 6*s.* 4*d.*, and accordingly the action was remitted to the county court judge to deal with this contention.

The action was tried in the county court on Mar. 22, 1939, when the county court judge took the view that the £65 6*s.* 5*d.*, which was treated as the sum which at the date of payment out was sufficient, and, indeed, more than sufficient, to buy at the time 8,100 francs, satisfied the debt, and that nothing further was due to the plaintiffs. Accordingly, he gave judgment for the defendant with costs. From this decision the plaintiffs appealed.

It was not disputed that the contract which gave rise to the defendant's obligation was one to which the law of France applied, nor that under it the defendant became bound to pay the plaintiffs 8,100 francs in Paris on Sept. 24, 1936. On behalf of the defendant, it was contended that, if, before payment in the action, the defendant had paid 8,100 francs to the plaintiffs in French currency, that would have put an end to the plaintiffs' claim for the debt. It is clear that at all events in this court that contention must be treated as correct, in view of this court's decision in *Société des Hôtels Le Touquet-Paris-Plage* v. *Cummings* (1), and, indeed, the contrary was not argued.

On behalf of the defendant, it was sought to support the decision of the county court judge by arguing that the payment to the plaintiffs in England of the equivalent, on the exchange at the date of payment, of 8,100 francs ought in fairness and reason to have the same operation with regard to satisfying the debt as a payment of 8,100 francs in France on the same day would have had. We feel the force of the argument. and we are not unmindful of the fact that precisely the same argument seems to have been accepted by the majority (five out of nine) of the judges of the Supreme Court of the United States of America in *Deutsche Bank Filiale Nurnberg* v. *Humphrey* (2). We are of opinion, however, that, as the authorities in our courts stand, this argument should be rejected, and that this court ought, in agreement with the opinion of the four dissenting judges in the *Deutsche Bank* case (2), to hold that a creditor in respect of a debt incurred in a foreign currency is entitled, in a suit in our courts, to recover the equivalent of the debt in our currency calculated according to the rate of exchange prevailing at the date when the debt became payable. Our reasons for this opinion are as follow.

Since the decision of the House of Lords in *S.S. Celia* v. *S.S. Volturno* (3), following and approving the decision of this court in *Di Ferdinando* v. *Simon, Smits & Co., Ltd.* (4), it has been settled law in this country (*a*) that, in the case of a claim for damages for breach of contract, or in the case of a claim in tort for fixed and definite damage due to conditions determined at a particular date, the amount of damage has to be assessed, in the case of contract, by reference to the date of breach, and, in the case of tort mentioned above, by reference to the particular date for determination of the damage, and (*b*) that, where in any such case the damages are primarily assessed in a foreign currency, the relief given by a court in this country, which must express its judgment in sterling, must be calculated on the rate of exchange prevailing at the material date—namely, in the case of contract, the date of breach.

If this be the position, the only question open in this court would seem to be whether or not any distinction can in principle be drawn between the case of a claim in respect of breach of contract which results in relief by way of damages and a like claim which results in relief by way of judgment for a fixed sum. We can find no logical ground for such a distinction either in reason or in any principle which can be deduced from the decided cases. Indeed, counsel supporting the judgment below was not able to formulate any such principle, still less to point to any decided cases from which any such principle could be deduced.

It was agreed, in our view correctly, that on the precise point there is no decision binding this court. It is the fact that LORD SUMNER, speaking in the House of Lords on July 28, 1921, was careful to state the reasons given for his opinion in *S.S. Celia* v. *S.S. Volturno* (3) in terms which cover only the case of a claim for damages and do not expressly deal with a claim for a debt. It is also the fact that in *Société des Hôtels Le Touquet-Paris-Plage* v. *Cummings* (1), at p. 465, ATKIN, L.J., sitting in this court on Dec. 20, 1921, was careful to keep open the precise point which it now falls to us to determine.

It is the fact, however, that in 1921 the precise point was decided in favour of the appellants' contention by an opinion which must now, we think, be treated as deciding the matter conclusively so far as a court of first instance is concerned. On Mar. 15, 1921, P. O. LAWRENCE, J., delivered two judgments, both in the matter of the liquidation of the British American Continental Bank. In the first case—*Re British American Continental Bank, Ltd., Goldzieher & Penso's Claim* (5)—he had to deal with a claim for damages for breach of contract to deliver foreign currency, and in that case, as in the subsequent similar case, in the same liquidation—*Re British American Continental Bank, Ltd., Lisser & Rosenkranz's Claim* (6)—he had no difficulty in applying the principle enunciated in *S.S. Celia* v. *S.S. Volturno* (3), to the case of a contract to deliver foreign currency; and in each case his decision was affirmed in this court. The second judgment which P. O. LAWRENCE, J., delivered on that day—*Re British American Continental Bank, Ltd., Credit General Liegeois' Claim* (7)—dealt with the exact point which is now before us, and is a clear decision that a claim in debt is on the same footing for the present purpose as is a claim for damages for breach of contract. That case was not taken to the Court of Appeal, but the same conclusion was reached in *Peyrae* v. *Wilkinson* (8), and the decision of P. O. LAWRENCE, J., was mentioned in this court in *Re Chesterman's Trusts, Mott* v. *Browning* (9), at p. 485, without any indication of disapproval, and, indeed, in a connection which suggests that WARRINGTON, L.J., felt no doubt as to the construction of the principle on which it proceeded, a principle supported by the well-known *dictum* of VAUGHAN WILLIAMS, L.J., in *Manners* v. *Pearson & Son* (10), at p. 592.

The exact point is one which must arise almost daily in commercial practice, and there is no indication to be found in the books that, during the seventeen years since the decision of P. O. LAWRENCE, J., it has been regarded as open to question. In these circumstances, we should not be prepared to overrule that decision, even if we thought, which we do not, that any other conclusion could be reached consistently with the decision of the House of Lords in *S.S. Celia* v. *S.S. Volturno* (3).

In these circumstances, we propose to follow the decision of P. O. LAWRENCE, J., in the case cited, and the appeal will be allowed. There will be judgment for the plaintiffs for the difference between the sum of £65 6*s*. 5*d*. and the sum of £105 6*s*. 4*d*., and for the costs below. The defendant must pay the costs of this appeal, and there will be leave to appeal to the House of Lords.

Solicitors: *Rowe & Maw* (for the appellants); *Winter & Co.* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re CAWSTON'S CONVEYANCE, ST. LUKE, BROMLEY COMMON (VICAR AND CHURCHWARDENS) *v.* CAWSTON.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **October 18, 19, 1939.**]

Education—School—Conveyance under School Sites Acts—Reverter on cesser of use of school—Conveyance by owner in fee simple for full value—Enrolment—Charitable Uses Act, 1735 (c. 36)—*School Sites Act*, 1841 (c. 38), *s*. 2—*School Sites Act*, 1844 (c. 37), *s*. 3—*School Sites Act*, 1849 (c. 49), *s*. 4—*Public Parks, Schools, and Museums Act*, 1871 (c. 13), *ss*. 3, 4.

By a conveyance dated Aug. 20, 1883, a piece of land was conveyed in fee simple in consideration of £250, the full value, to the vicar and churchwardens of a parish for the purposes of a school under the School Sites Act, 1841. In 1938, the school erected thereon ceased to be used as such, having become redundant by reason of the erection of large modern schools in the neighbourhood. The conveyance of 1883 was not enrolled:—

HELD: (i) the provisions of the School Sites Act, 1841, as to reverter applied to a grant by an owner in fee simple.

(ii) it was putting too narrow a construction upon sect. 2 of the Act to say that it had no application unless the land conveyed had previously formed part of a large estate.

(iii) the Public Parks, Schools, and Museums Act, 1871, ss. 3, 4, applied to this grant, as being one of a school-house for an elementary school, and therefore the conveyance of 1883 did not require to be enrolled.

(iv) in the result, the reverter under the School Sites Act, 1841, s. 2, took effect.

Decision of SIMONDS, J. ([1939] 3 All E.R. 1) *affirmed.*

[**EDITORIAL NOTE.** The question of reverter in the case of a voluntary grant was considered in *Dennis* v. *Malcolm* (1). The present decision extends that decision to a grant for full consideration. There is, however, an additional point, in that it is decided that the conveyance was within the Public Parks, Schools, and Museums Act, 1871, and thus exempt from the restrictions placed upon conveyances by the Statutes of Mortmain.

AS TO THE SCHOOL SITES ACTS, see HALSBURY, Hailsham Edn., Vol. 12, p. 131, para. 279; and FOR CASES, see DIGEST, Vol. 19, p. 597, Nos. 258, 259.]

Cases referred to:

(1) *Dennis* v. *Malcolm*, [1934] Ch. 244; Digest Supp.; 103 L.J.Ch. 140; *sub nom. Re Cheam Common School, Dennis* v. *Malcolm*, 150 L.T. 394.

(2) *Cotter* v. *Layer* (1731), 2 P. Wms. 623; 37 Digest 500, *928*.

APPEAL by the plaintiffs from an order of SIMONDS, J., dated May 10, 1939, and reported [1939] 3 All E.R. 1, where the facts are fully set out.

T. K. Wigan and *A. Newman Hall* for the appellants.

J. V. Nesbitt for the respondent.

Wigan: The matter depends upon the effect of the School Sites Act, 1841, s. 2. There is never a reverter when the conveyance is made by an absolute owner in fee simple for his own benefit. The Act says that the land should revert as if the Act had not been passed, and in the present case it would not have reverted if the Act had not been passed. The decision of CLAUSON, J., as he then was. in *Dennis* v. *Malcolm* (1) was wrong, but SIMONDS, J., was bound by that decision. My second point is that there is no reverter where the conveyance is made by an owner in fee simple absolute for value or the grantor is expressed to convey as beneficial owner. Where the conveyance is made by an owner in fee simple, the proviso in sect. 2 has no application, because the grant is not made under that section. A grantor ought not to be assumed to be granting under sect. 2 when the grantor is the absolute owner conveying for value, because in such a case he must be assumed to be conveying by the best title he has: *Cotter* v. *Layer* (2). My third point is that there can be no reverter in the present case, because the Act provides that, when reverter takes place, the site is to become a portion of the estate of which it formerly was a part. In the present case, the site never formed part of any estate. My last point is that the School Sites Act, 1841, does not exempt conveyances from enrolment as required by the Mortmain and Charitable Uses Acts. In the present case, as the conveyance was never enrolled, the grant was void *ab initio*, and as the appellants have been in possession ever since, they have acquired a title by possession. The rights of the respondent are, therefore, barred

Counsel for the respondent was not called upon.

SIR WILFRID GREENE, M.R.: This is an appeal from an order of SIMONDS, J., made upon an originating summons, which raised a question in relation to the operation of the School Sites Act, 1841. That Act (the title of which describes it as "an Act to afford further facilities for the conveyance and endowment of sites for schools," an object which the preamble declares to be expedient) repeals an earlier Act, and the crucial section, namely, sect. 2, is as follows:

> Any person, being seised in fee simple, fee tail, or for life, of and in any manor or lands of freehold, copyhold, or customary tenure, and having the bene-

> ficial interest therein . . . may grant, convey, or enfranchise by way of gift, sale, or exchange, in fee simple or for a term of years, any quantity not exceeding one acre of such land, as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge . . .

Then there is a provision to meet the case of a limited owner or the lord of a manor, and then comes this further proviso : A

> . . . that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise, or of any manor or land as aforesaid, as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding. B

Then there are provisions dealing with the possessions of the Duchies of Lancaster and Cornwall, and various other provisions to which I need not refer ; and in cl. 7, which is of general application, and is not limited to grants made under the powers in the Act, a provision is made, for obvious reasons of convenience, under which, to take the case which C is relevant to the present argument, that of a minister and churchwardens, a grant to such minister and churchwardens is to have the special effect of causing the land granted to vest in the minister and churchwardens for the time being. Then sect. 10 sets out a specimen form of grant, and provides, among other things, that more than one D witness to the execution by each party shall not be requisite. Those, I think, are the only sections to which I need call special attention.

It is worth noticing at the outset one or two things about that Act of Parliament. First of all, it is directed to providing greater facilities for the erection of schools, and it does so in a variety of ways. It does E so by conferring upon limited owners or persons whose interests would not entitle them to make the dispositions contemplated, extended powers to effect what the Act desires to have effected ; and it provides that a result will follow from conveyances made under those powers which could not have followed by any means other than the operation of some F statutory power, because the rule against perpetuities would have prohibited it, namely, that, upon the land ceasing to be used for the stated purposes, a school site, or a schoolmaster's house, it is to revert to the estate from which it originally came. That was a thing which by no device could have been effected apart from statutory power. Another G method in which the statutory power enables the existing law to be overridden is in the nature of the donees or grantees under any such grant. Taking the particular case of minister and churchwardens, a conveyance by sect. 7 is to have the operation of vesting the land in the minister and churchwardens for the time being. That is a thing H which could not have been effected apart from statute, because the minister and churchwardens are not a corporation. It is important to bear those considerations in mind in view of the arguments that have been raised on behalf of the appellants. One can see that the provision with regard to reverter would have been, and no doubt was, considered by the legislature to be a very useful encouragement to charitably-minded persons, particularly if they were the owners of an estate, or life tenants of a settled estate, to make grants for purposes such as these, because such persons might very well be satisfied to have the village school built upon the family estate, but would strongly object A to the site on which such a school had been built being diverted later on to other purposes. Therefore, as I have said, that proviso as to reverter must have been a very valuable encouragement, because landowners by reason of it were thus enabled to ensure that the site should be used in perpetuity for school purposes, or, if it ceased to be used for B school purposes, that they would get it back. The common sense of that is obvious.

On Aug. 20, 1883, one Samuel Cawston, living at Bromley in the county of Kent, conveyed to the minister and churchwardens of the parish of Holy Trinity, Bromley Common, a piece of land on which a C school had then recently been erected. Cawston appears to have been a landowner in the neighbourhood, but this particular piece of land was not part of his estate, and, indeed, appears to have been an isolated purchase. I may say, before looking further at the deed, that the minister and churchwardens of the parish of Holy Trinity, Bromley D Common, are now replaced by the vicar and churchwardens of St. Luke, Bromley Common, by reason of a rearrangement in the matter of parish boundaries, or something of that kind, but that is a mere circumstance of history, and does not affect the questions which we have to decide.

E The conveyance, after reciting the acquisition of the piece of land by Cawston and the erection of the school, witnessed that under the authority of (giving it the short title) the School Sites Act, 1841, and of an Act of 1844, explaining the same, and in consideration of the sum of £250 paid to Cawston by the minister and churchwardens, who are F described as the trustees, Cawston as beneficial owner conveyed unto the trustees and their successors the piece of land in question together with the school built thereon :

> To hold unto and to the use of the said trustees and their successors in fee simple for the purposes of the said Act and upon trust subject nevertheless to the proviso G hereinafter contained to permit the said premises and all buildings thereon now or hereafter erected to be for ever hereafter appropriated and used as and for a school for the education of children and adults or children only, of the labouring manufacturing and other poorer class in the Parish of Holy Trinity Bromley Common aforesaid or of any new district which may hereafter be assigned therefrom and as a residence for the teacher or teachers of the said school and for no other purpose which said school shall always be in union with and conducted upon the principles and in furtherance of the ends and designs of the incorporated H National Society for promoting the education of the poor in the principles of the Established Church.

Then there is a provision under which the trustees are empowered at the request of the National Society, but not otherwise, to convey for educational purposes to any body corporate or persons authorised by law their estate or interest thereby vested in them. Then there is a provision as to the management of the school, and certain provisions as to restrictive covenants, with which we are not concerned.

If there is one thing which is to my mind clear beyond possibility of controversy, whatever the effect of it may be, it is that the intention of Cawston, when he executed this conveyance, was to execute a conveyance which would operate by virtue of the provisions of the Act and would carry with it all the consequences for which the Act provides. Cawston purports to convey under the authority of that Act and under no other authority, and he conveys to trustees for the purposes of the Act, and, therefore, merely looking at the construction of this document, it is perfectly clear that it is to be referred to the statutory power which Cawston had by virtue of the Act of 1841. One would have thought that on that basis the necessary result would be that all the consequences laid down in the Act would follow. The result of this conveyance was that, by virtue of sect. 7 of the Act, and not by virtue of any power outside that section, the land conveyed vested in the minister and churchwardens for the time being, and, further, by virtue of the provisions of the Act, it was intended as clearly as anything could be that, once the condition was fulfilled under which the reverter proviso in sect. 2 of the Act was to come into operation, reverter should take place. In point of fact, the circumstances which that proviso contemplates have in this particular case come into operation, and hence arises the controversy between Cawston's representative and the vicar and churchwardens of the present parish of St. Luke, the former saying that the reverter clause has an application in his favour and the latter saying that it has no application in the present case. There could be no question whatever, in my judgment, if the case had been one of a limited owner. A tenant for life could not have suggested for one moment that the deed could have effect according to its terms apart from the statutory power conferred by the Act of 1841, which would necessarily carry the statutory consequences. The only colour of plausibility which can be given to the main argument of the present appellants is due to the circumstance that Cawston was the absolute owner of this land. By way of a background, counsel for the appellants suggested that the real matter with which sect. 2 was concerned was the case of limited owners or persons like the lords of manors who had not full power of disposition. I am unable to regard that argument as one which carries any result, because, although no doubt those cases were very typical cases, and might well have been the most common cases, especially at that date, nevertheless sect. 2 provides, as clearly as any section could provide, for the case of the absolute owner, and accordingly I do not find that there is anything in that suggestion which in any way assists the argument of counsel for the appellants.

Now, however, he says that Cawston, being an absolute owner, had the power to convey this piece of land to trustees for charitable purposes, subject, of course (if indeed it applied), to the law relating to mortmain and charitable uses, and he says that the conveyance must be given an operation by virtue of his absolute ownership, and not by virtue of some power in the Act which really was not necessary to make the conveyance effective. I cannot accept that argument. As I have already pointed out, there are two things which could not be effected A by a conveyance by an absolute owner outside the Act. One was the introduction into the consequences of the transaction of the provision as to reverter. That it was the intention that that provision should operate is clear on the face of this document, in spite of the fact that, quite naturally, no express reference is made to it. The other respect B in which the result quite clearly intended and contemplated could not have been effected was the vesting in the minister and churchwardens for the time being. It appears to me that, as a pure matter of construction of this document, the references to the powers of the Act of Parliament mean that the document is to be construed as one which C is intended to have those two consequences. Those two consequences were consequences which, as I have said, Cawston as absolute owner could not possibly have effected apart from the power conferred upon him by the statute. In connection with this argument, counsel for the appellants relied upon the phrase in sect. 2, that the land granted should D revert to, and become a portion of, the said estate, namely, the estate out of which it was carved, as fully to all intents and purposes as if this Act had not been passed. He says that, if the Act had not been passed then in the case of a conveyance by an absolute owner there never would have been any reverter, and, therefore, there cannot in such a case be E a reverter under the terms of the proviso. However, in my opinion, that argument really will not bear examination. It is based upon a construction of this proviso, which appears to me to be quite hopelessly narrow. The words

revert as fully to all intents and purposes as if this Act had not been passed

F in relation to any conveyance which is made under the Act, are really a quite inaccurate expression to begin with, because, if the Act had not been passed, the conveyance, so far as it required the Act to give it validity, would never have been made, and, therefore, there would never have been any question of the land leaving the grantor. In fact, what G it means, it appears to me, is merely that, in the circumstances stated, the land is to come back and join up again with the estate from which it was derived as though the transaction carried out under the powers of the Act had never taken place.

I have endeavoured to express on this part of the argument in my H own language my reasons for thinking that the argument cannot prevail. In point of fact the precise point on this part of the argument has already been dealt with in a decision of CLAUSON, J., in *Dennis* v. *Malcolm* (1). He there decided the point against the party who was then putting it forward, and decided it, if I appreciate his reasons rightly, on grounds similar to those which I have expressed, although perhaps not stated with the fullness with which I have thought it right to state them in order to put the matter in my own language.

With regard to the next two points which counsel for the appellants took, the first of them was that no reverter will take place where the conveyance is by an absolute owner for his own benefit who either conveys for value or is expressed to convey as beneficial owner. That appears to me to be quite unfounded. The section itself contemplates the grant by way of sale, and the fact that certain covenants are now implied where the grantor conveys as beneficial owner does not appear to me in any way to take away the perfectly clear operation of the conveyance, which was made (as I have already said) with the intention of executing and in pursuance of the powers conferred by the Act of 1841, and with the intention that the statutory scheme laid down in the Act should apply.

Then came the next point, which was not taken below, that reverter cannot take place in the present case because this piece of land was a piece of land by itself and never formed part of any estate. It is sufficient to say that that construction of the section would make it impossible for anyone who merely held one acre or less to grant it for the purposes indicated, whereas a person who had an acre-and-a-quarter and conveyed an acre and kept the quarter would apparently get the benefit of reverter. That argument, in my judgment, is putting much too narrow a construction on the language of the proviso.

The next and the last point is this. It is said that the Act of 1841 does not exempt conveyances made under it from the provisions of the Mortmain and Charitable Uses Acts in force at the relevant time, that when this conveyance was made, enrolment under those Acts was necessary, that no such enrolment took place, that the conveyance accordingly was void, and that, in the result, the present appellants have acquired a title under the Statute of Limitations. I do not pause to inquire whether, if the first of these propositions was right, the consequence stated would follow. There are obvious points which would have to be carefully considered if we ever got to that stage, but, in my opinion, the argument fails at an earlier stage. In my opinion, the Act of 1841 is a code in itself with regard to the particular subject-matter with which it deals, and conveyances made under it are not conveyances to which the Charitable Uses Act, 1735, the relevant Act then in force, applied. When I look at that Act, I find (stating it quite shortly) that no land should be granted in trust for any charitable uses unless certain things were complied with, among others enrolment within six calendar months and execution (except in the case, I think I am right in saying, of conveyances for value) not less than twelve months before the death of the grantor. When I look at the Act of 1841, I find that it says in terms in sect. 2 that a particular kind of conveyance to charitable uses may be made, thereby contradicting and making an exemption from the general statutory prohibition in relation to grants for charitable

uses which the Charitable Uses Act, 1735, imposed. In my opinion, the particular and special provisions of the Act of 1841 had the effect of exempting from the general provisions of the Charitable Uses Act, 1735, a conveyance made in accordance with the Act of 1841. The only grounds which might be relied upon as pointing in the opposite direction
A are grounds which, before SIMONDS, J., led counsel for the respondent not to argue to the contrary, and SIMONDS, J., assumed, without deciding, that the provisions of the Charitable Uses Act, 1735, would have applied. Those grounds are, first, in the Act itself the reference in sect. 10 to the provision that not more than one witness shall be necessary (the
B Mortmain Acts provided for two witnesses). It is said that that is an indication that, subject to that modification, the other provisions of the Mortmain Acts are to remain in operation. I do not find this point convincing.

The next ground suggested is that in the School Sites Act, 1844,
C s. 3, there is an express enactment that conveyances made under sect. 2 of the Act of 1841 are to be valid although the donor shall die within twelve calendar months from the execution thereof. It is said that, if the Mortmain Acts had not applied, that provision would have been quite unnecessary. I think I am right in saying that there is another
D exception, namely, sect. 4 of the Act of 1849, which gives very extended powers of grants for school purposes, going very far beyond what the Act of 1841 provided for, and it is provided, in terms in that section that such grants shall be valid even if the grantor dies within twelve calendar months. It is to be observed that the Act of 1844 is not an
E Act described as an Act to amend the Act of 1841, but in the long title, which is the only title at that date, the Act is described as an Act to explain the Act of 1841, and there are similar words in the title to the Act of 1849. We are all of us familiar with the case where an ingenious point of doubt is raised, and, if the
F statute is one of far-reaching and general application, an indulgent legislature prefers to set the doubt at rest rather than leave it a subject of controversy, and perhaps of litigation. The fact that the provision to which I have referred comes in by way of explanation, leads me strongly to think that that was the origin of those particular sections in the
G Acts of 1844 and of 1849, but, however that may be, the presence of those sections in the later legislation does not lead me to construe the Act of 1841 in a way other than that which I have indicated, namely, that it is a code outside the Mortmain Act. If I am wrong in the view which I have formed that conveyances under the Act of 1841 did originally require
H enrolment, still I agree with the conclusion of SIMONDS, J., who held that at the relevant date, namely, Aug. 20, 1883, the date of the conveyance, the necessity for complying with the formalities of the Mortmain Acts had, in regard to this transaction, been removed by an Act passed in 1871, the short title of which is:

the Public Parks, Schools, and Museums Act, 1871.

That Act provides by sect. 4 that assurances of land for the purposes only of a school-house for an elementary school shall be valid notwithstanding the Charitable Uses Act, 1735, and other statutes commonly known as the Statutes of Mortmain. Accordingly, if this conveyance is a conveyance for the purposes only of a school-house for an elementary school, there was no need for any enrolment. Sect. 3 of the Act of 1871 defines the words " elementary school " as meaning

> . . . a school or department of a school at which elementary education is the principal part of the education there given, and shall not include any school or department of a school at which the ordinary payments in respect of the instruction from each scholar exceed ninepence a week . . .

No question, I may say in passing, arises as to any relevance in those latter words about the ninepence a week. The word " school-house " is defined as including the teacher's dwelling-house and the playground. The question therefore is : is this conveyance one of that character ? The purposes for which the grant is made by the conveyance are, as I have already read, to permit the premises to be for ever hereafter appropriated and used as and for a school for the education of children and adults or children only of the labouring, manufacturing and other poorer class in the parish, with a reference to the principles of the National Society. That, of course, must be read in the light of the circumstance that the conveyance is a conveyance which purports to be made under the powers conferred in the Act of 1841, and the habendum is, in terms, described as

> for the purposes of the said Act.

Accordingly, on ordinary accepted principles, it would not be proper to construe the purposes set out in this document as extending beyond those contemplated by the Act unless by clear language we were forced to do so. I therefore construe the purposes in this document by reference to the permissible purposes under sect. 2 of the Act, and I limit them within the four corners of the purposes so stated, and those purposes are

> . . . a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge.

An education of that character in relation to the poor persons indicated in 1841 can, in my opinion, only have meant, and been understood as meaning, what now in more modern phraseology is called elementary education, or, at any rate, did not extend beyond it. It is to be noticed that there is no definition of " elementary education " in the Act of 1871 to which I have referred, nor, so far as I am aware, is there in any other Act of Parliament any statutory definition of it. In point of fact, " elementary education " is anything that is not secondary or higher education, and what that has come to mean is a matter that has been developed in practice. Looking back to the Act passed in these terms in 1841, I have no hesitation in holding that the education which is there contemplated is the same thing as is comprised within the phrase " elementary education " in the Act of 1871.

On all those grounds, I am of opinion that this argument with regard to the Mortmain Acts fails. Counsel for the appellants has failed to persuade me that the decision of the judge was in any respect wrong, and the consequence is that the appeal must be dismissed.

CLAUSON, L.J.: I agree.

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Day & Son* (for the appellants); *Dennes & Co.* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

MINISTER OF NATIONAL REVENUE *v.* TRUSTS AND GUARANTEE CO., LTD.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer), **July 10, 11, October 12, 1939.**]

Privy Council—Canada—Income Tax—Income accumulating in Canada in trust for unascertained persons—Charitable institution—Liability for interest on unpaid tax—Income War Tax Act (*R.S.C.*, 1927, *c.* 97), *ss.* 4 (*e*), 11 (2), 48, 49, 66—*Statutes of Canada*, 1934 (*c.* 55), *s.* 7.

By a settlement made in 1918 the settlor transferred certain of his assets to the respondents, who were the trustees of the settlement. These assets were to be converted and the net proceeds to constitute a trust fund, which was to carry interest at 5¼ per cent. per annum, such interest being provided by the respondents. This interest was made the subject of a discretionary trust. The respondents were to pay to the settlor during his life such sums as they might think proper for his living expenses, and were permitted to pay a sum of $150 per annum to such charitable purposes as the settlor might request. The surplus of the interest was to be paid into an investment account, to carry interest at 5¼ per cent. per annum, and to become a part of the corpus. This accumulation was to go on until the expiration of 21 years from the death of the settlor, when the whole fund was to be paid by the respondents to the municipal council of Colne in Lancashire, England, for the benefit of the aged and deserving poor of that town. The settlor died in 1927. The appellant was not aware until 1935 that the income was being accumulated in Canada, and in that year he served notices of assessment to income tax on the respondents in respect of each of the years 1919 to 1934:—

HELD: (i) the words "unascertained persons" in the Income War Tax Act, 1927, s. 11 (2), are not confined in their meaning to persons having merely contingent interests, but include "the aged and deserving poor" of a municipality.

(ii) the trust was a charitable trust, but not a charitable institution, within the meaning of the Income War Tax Act, 1927, s. 4 (*e*).

(iii) the respondents were chargeable with the interest under sects. 48 and 49 of that Act, and the court had no discretionary power under sect. 66 of the Act to waive the payment of that interest.

[EDITORIAL NOTE. It was sought in the present appeal to limit the meaning of the expression "unascertained persons" so as to include only those who, though unascertainable at the moment, would ultimately take a vested interest in the property, the subsection in a later part of the same sentence using the words "persons with contingent interests." It was said that unborn issue was an example of such a class of persons. Under the present trust, no particular person can be said to have any beneficial interest in the fund. For this reason, it had been held in the courts below that the poor of a municipality were not unascertained persons within the meaning of the subsection. This view did not find favour with their Lordships, who adopted a much wider view of the meaning of the words in question.

As to Meaning of Charity for Income Tax Purposes, see HALSBURY, Hailsham Edn., Vol. 17, pp. 310-314, paras. 617-621; and for Cases, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483.]

Cases referred to:

(1) *McLeod* v. *Customs & Excise Minister*, [1926] S.C.R. 457; Digest Supp.

(2) *Minister of National Revenue* v. *Royal Trust Co.*, [1931] S.C.R. 485; Digest Supp.

(3) *Holden* v. *Minister of National Revenue*, [1933] A.C. 526; Digest Supp., 102 L.J.P.C. 115; 149 L.T. 315.

(4) *Re Douglas, Obert* v. *Barrow* (1887), 35 Ch.D. 472; 8 Digest 258, *205*; 56 L.J.Ch. 913; 56 L.T. 786.

(5) *Adamson* v. *Melbourne & Metropolitan Board of Works*, [1929] A.C. 142; Digest Supp.; 98 L.J.P.C. 20; 140 L.T. 107.

(6) *Manchester Corpn.* v. *McAdam*, [1896] A.C. 500; 28 Digest 14, *66*; 65 L.J.Q.B. 672; 75 L.T. 229; 3 Tax Cas. 491.

(7) *Mills* v. *Farmer* (1815), 1 Mer. 55; 8 Digest 348, *1423*.

(8) *Re Willis, Shaw* v. *Willis*, [1921] 1 Ch. 44; 8 Digest 349, *1431*; 90 L.J.Ch. 94; 124 L.T. 290.

(9) *Verge* v. *Somerville*, [1924] A.C. 496; Digest Supp.; 93 L.J.P.C. 173; 131 L.T. 107.

(10) *National Trust Co.* v. *Minister of National Revenue*, [1935] Ex.C.R. 167; Digest Supp.; [1936] 1 D.L.R. 129.

Appeal from a judgment of the Supreme Court of Canada (Sir Lyman P. Duff, C.J., Davis, Crocket and Hudson, JJ., Kerwin, J., dissenting), dated Dec. 19, 1938, reversing the judgment of the Exchequer Court of Canada (McLean, J.), dated Jan. 4, 1938. The judgment of their Lordships was delivered by Lord Romer.

John Jennings, K.C., and *Frank Gahan* for the appellant.

S. Casey Wood, K.C., and *G. M. Jarvis* for the respondents.

Jennings, K.C.: The income of this trust, in respect of which it is sought to tax the respondents, was accumulating in Canada, in trust, for the benefit of unascertained persons. Income so accumulating is taxable under sect. 11 (2) of the Act in the hands of the trustees. The Act provided for the charging of interest on arrears of income tax, and the Exchequer Court had not any power to disallow such interest. [Counsel referred to *McLeod* v. *Customs & Excise Minister* (1), *Minister of National Revenue* v. *Royal Trust Co.* (2), *Holden* v. *Minister of National Revenue* (3), *Re Douglas, Obert* v. *Barrow* (4), *Adamson* v. *Melbourne and Metropolitan Board of Works* (5), *Manchester Corpn.* v. *McAdam* (6), and to Halsbury, Hailsham Edn., Vol. 4, p. 336, para. 567.]

Casey Wood, K.C.: Sect. 11 (2) of the Act deals with private trusts. *Holden* v. *Minister of National Revenue* (3) and other cases are all private trusts. The settlor has created a charitable trust, and the gift does not at any time vest beneficially in any particular person or persons. The aged and deserving poor cannot be regarded otherwise than as a class in the community. To regard them otherwise is to destroy the character of what is obviously a charitable trust. The settlor by the execution of the indenture brought into being a charitable trust and a charitable institution organised for carrying out his charitable intention, and the income of the charitable institution is, by the terms of the Act, exempt from taxation. [Counsel referred to *Mills* v. *Farmer* (7), *Re Willis, Shaw* v. *Willis* (8), *Verge* v. *Somerville* (9), and to LEWIN ON TRUSTS, 13th Edn., p. 16.]

Jarvis: In *National Trust Co.* v. *Minister of National Revenue* (10), interest was disallowed on a portion of the tax which the Minister had elected not to assess for some years.

Jennings, K.C., in reply.

LORD ROMER: This is an appeal by the Minister of National Revenue from a judgment of the Supreme Court of Canada, dated Dec. 19, 1938, reversing by a majority a judgment of the Exchequer Court of Canada given in his favour on Jan. 4, 1938. The question to be determined on the appeal is whether the respondents, a Canadian company, are, as the trustees of an indenture of May 27, 1918, liable to be assessed to income tax in respect of the income accumulated by them during the years 1919 to 1934 inclusive, pursuant to the trust for accumulation contained in that indenture.

The indenture, which was made between one Peter Birtwistle, therein called the settlor, of the one part and the respondents of the other part, is of a somewhat unusual nature, and is by no means clearly worded. The effect of it, however, would seem to be as follows. Various assets of the settlor which had already been, or were thereby, transferred to the respondents were to be converted and got in by them, and the net proceeds, together with the net income of the assets pending conversion after deduction of expenses, were to be transferred to an investment account. The money so transferred constituted the capital of the trust fund, and was to carry interest at the rate of 5¼ per cent. per annum, such interest being provided by the respondents. Out of this interest the respondents were to pay to the settlor during his life such sums as they might think fitting and proper for him to expend on his " living expenses," which expression, however, was not to be deemed to include any obligations incurred by the settlor by speculation. The respondents were also permitted to pay out of the income $150 per annum to such charitable purposes as the settlor might request. The surplus of such interest was to be paid into the investment account on Jan. 1 in each year, and added to and become part of the corpus, and itself carry interest at 5¼ per cent. This accumulation of interest was to go on until the expiration of 21 years from the death of the settlor, when the whole fund, with the accumulations, was to be paid by the respondents to the municipal council of the town of Colne in Lancashire, England :

> . . . to be used by the said council for the benefit of the aged and deserving poor of the said town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said council . . .

In the meantime, the respondents might invest the fund and its accumulations standing to the credit of the investment account in the purchase of or loan upon such securities as they thought fit. Any such investments, however, were to be at the risk of the respondents, who guaranteed the eventual payment to the municipal council of the corpus of the fund, together with the accumulations of the interest at the rate of 5¼ per cent. It was on the other hand provided that, by way of remuneration for such guarantee and for their management of the trust, the respondents should be entitled to retain for their own use and benefit :

> . . . the surplus of interest or profit, if any, resulting from the investment or loaning of the said investment account over and above the rate of interest (5¼ per cent.).

It was further provided that, upon the payment over to the municipality of Colne at the expiration of the period of 21 years from the settlor's death of the guaranteed sum, the securities then held by the respondents in respect of the investment account should become the property of the respondents freed from the trusts thereby created.

In each of the years from 1919 to 1934 inclusive, the respondents reported to the appellant, on the regular form required to be filed by trustees and others acting in a fiduciary capacity, the amounts of the income received by them under their trust. The purpose of this return is for information, and not for taxation, inasmuch as the Dominion income tax legislation does not, speaking generally, provide for taxation by deduction at source of trust income in the hands of trustees, but imposes the tax directly upon the beneficiaries who are entitled to receive that income. The return to be made by the trustees must, therefore, give the names and addresses of the beneficiaries who are so entitled. In the present case, accordingly, the respondents, after stating in each return the income of the trust for the year in question (which presumably was the surplus for that year of the interest that they had guaranteed), added the following words :

> Income accrues to the municipal council of Colne, England, for the benefit of aged and deserving poor.

Had the income been applied each year for the benefit of such aged and deserving poor, instead of being subject to the trust for accumulation, the income would not have been liable to taxation under the income tax legislation of the Dominion, one sufficient reason being that the beneficiaries under the trust were not resident in Canada. However, the Income War Tax Act, 1920, contained a section which was deemed to have come into force at the commencement of the 1917 taxation period, and which was reproduced verbatim as sect. 11 (2) of the Revised Statutes of 1927, c. 97 :

> Income accumulating in trust for the benefit of unascertained persons, or persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person.

The section was repealed by an amending Act in 1934 (Statutes of Canada, 1934, c. 55, s. 7), but re-enacted in the same form, except that for the concluding words " an unmarried person " there were substituted the words " a person other than a corporation," followed by a proviso which is not material for the present purpose.

It appears that the appellant, and the officials administering the Income War Tax Act under him, failed to realise that the income referred to in the respondents' returns was being accumulated by the respondents in Canada. He says that he or his officials first became aware of this fact in 1935 in consequence of certain proceedings relating to the trust taken in that year in the Supreme Court of the Province of Ontario. He therefore caused notices of assessment to income tax to be served upon the respondents in respect of each of the years 1919 to 1934. The total amount claimed, including interest, was $36,053·25. The respondents appealed to the Minister against the assessments. They contended that the income was being accumulated either for the benefit of the municipal corporation of Colne or for the benefit of the aged and deserving poor of the town, and that neither the municipal corporation nor the aged and deserving poor were unascertained persons within the meaning of the Act. They contended, alternatively, that the income in question was the income of a charitable institution, and, as such, exempted from taxation by virtue of the Income War Tax Act, s. 4 (*e*), which exempts :

> . . . the income of any religious, charitable, agricultural and educational institutions, boards of trade and chambers of commerce.

Peter Birtwistle, the settlor, had died in 1927.

The appeal was dismissed by the Minister, the present appellant, who affirmed the assessments. The respondents thereupon gave notice of dissatisfaction in accordance with the provisions of sect. 60 of the Act, and the matter in due course came on for hearing in the Exchequer Court before MACLEAN, J. The judge affirmed the Minister's decision. He held that the income was being accumulated, not for the benefit of the town of Colne, but for the benefit of a class of which the members are presently unascertainable and will always be fluctuating. He held further that neither the respondents nor the municipal council of Colne nor the town of Colne nor the trust fund itself were charitable institutions. He also decided that interest on the income tax had been properly charged, a matter that will be dealt with more fully later on. By judgment dated Jan. 4, 1938, the respondents' appeal was dismissed without costs.

The respondents thereupon appealed to the Supreme Court of Canada, where the case was heard by Sir Lyman P. Duff, C.J., and Crocket, Davis, Hudson and Kerwin, JJ. The appeal was allowed with costs there and below (Kerwin, J., dissenting), and the assessments were discharged. Davis, J., in whose judgment Sir Lyman P. Duff, C.J., and Crocket, J., concurred, was of opinion that sect. 11 (2) of the Act of 1927 had in contemplation income that would vest in, and ultimately pass to, persons for the time being unascertainable, such, for instance, as unborn issue, or to persons whose rights were for the time being merely contingent interests. However, under the trust now in question, he said, no particular person will ever acquire a right to demand and receive the beneficial interest in the income from the fund or any part thereof. He held, therefore, that the subsection did not apply. Hudson, J., also thought that the persons referred to in the subsection were persons who might become entitled to specific portions of the fund.

Their Lordships are unable to take this view of the matter. They can find no warrant for introducing into the subsection a qualification that is not there. In their Lordships' opinion, the subsection applies in every case where income is being accumulated in trust for the benefit of unascertained persons, whether or not those persons will ultimately take a vested interest in such income, and whether or not they will ever become entitled to specific portions of it. In the present case, the accumulated interest in the hands of the respondents as trustees will, in 1948, have to be handed over to the municipal council of Colne as trustees in trust to be applied for the benefit of the aged and deserving poor of that town. Such aged and deserving poor are, without any question, persons, and, equally without question, they are unascertained. The case, therefore, seems to fall within the very words of the subsection. This was the view of the matter that commended itself to Kerwin, J.

It is moreover to be observed that in an earlier decision of the Supreme Court the subsection was held to be applicable to a case in which it was possible that no person would ever acquire a vested right in any specific portion of the income that was being accumulated. This was in *McLeod* v. *Customs & Excise Minister* (1). In that case, income of a residuary fund was being accumulated for 21 years from the death of a testator, at the end of which time the whole fund was to be conveyed to his three children, but so that, if any child were then dead, his share was to be divided by the trustees of the will amongst the testator's grandchildren, if any, as the trustees might think best. Not only, therefore, were the persons for whom the interest was being accumulated unascertained, but, in the event of one of the testator's children dying before the expiration of the 21 years, it could not be said, at the end of that period, of any grandchild that he was entitled to receive any specified portion of the trust fund any more than in the present case it will be possible to say it of any of the aged and deserving poor in the town of Colne in 1948.

In view of the construction put by the majority of the Supreme Court upon sect. 11 (2) of the Act, it was not necessary for them to express any opinion upon the question whether the respondents could succeed A upon the ground that the income in question was exempted from taxation as being income of a charitable institution, or upon the question whether interest was properly chargeable upon the tax prior to the date of assessment. KERWIN, J., however, dealt with both of these questions, and decided both of them adversely to the respondents. In their Lordships' B opinion, he was right in so doing.

As to the first of these questions, it would appear from the judgment of MACLEAN, J., that the respondents had contended before him that the respondents themselves or the municipal council of Colne or the town of Colne were charitable institutions. Any such contention is C obviously absurd, and was very properly omitted from the argument on behalf of the respondents before this Board. It was, however, strenuously urged before their Lordships that the trust regarded as a whole was a charitable institution. That it is a charitable trust no one can doubt, but their Lordships are unable to agree that it is a D charitable institution such as is contemplated by sect. 4 (*e*) of the Act. It is by no means easy to give a definition of the word "institution" that will cover every use of it. Its meaning must always depend upon the context in which it is found. It seems plain, for instance, from the context in which it is found in the subsection in question that the word E is intended to connote something more than a mere trust. Had the Dominion legislature intended to exempt from taxation the income of every charitable trust, nothing would have been easier than to say so. In view of the language that has in fact been used, it seems to their Lordships that the charitable institutions exempted are those which F are institutions in the sense in which boards of trade and chambers of commerce are institutions, such, for example, as a charity organisation society, or a society for the prevention of cruelty to children. The trust with which the present appeal is concerned is an ordinary trust for charity. It can be regarded as a charitable institution within the G meaning of the subsection only if every such trust is to be so regarded, and this, in their Lordships' opinion, is impossible. An ordinary trust for charity is, indeed, only a charitable institution in the sense that a farm is an agricultural institution. It is not in that sense that the word "institution" is used in the subsection.

H It only remains to deal with the question of the interest charged upon the tax prior to the date of assessment. The question turns upon sects. 48, 49 and 66 of the Act. Sect. 48 provides as follows:

> Every person liable to pay any tax under this Act shall send with the return of the income upon which such tax is payable not less than one-quarter of the amount of such tax, and may pay the balance, if any, of such tax, in not more than three equal bi-monthly instalments thereafter, together with interest at the

> rate of six per centum per annum upon each instalment from the last day prescribed for making such return to the time payment is made.

Sect. 49 provides as follows:

> If any person liable to pay any tax under this Act pays as any instalment less than one-quarter of the tax as estimated by him, or should he fail to make any payment at the time of filing his return or at the time when any instalment should be paid, he shall pay, in addition to the interest at the rate of six per centum per annum provided for by the last preceding section, additional interest at the rate of four per centum per annum upon the deficiency from the date of default to the date of payment.

In each of the years 1919 to 1934 the respondents failed to make any payment at the time of filing their returns, or at the time when subsequent instalments under sect. 48 should have been paid. They became, therefore, chargeable with the additional interest prescribed by sect. 49 in addition to the interest mentioned in sect. 48. This they do not deny. Their contention that, in the circumstances, the interest should not be charged is based upon sect. 66, which provides as follows:

> Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said court may seem right and proper.

It is contended that this provision gives to the court a discretion to determine whether interest shall or shall not be exacted from the taxpayer. Their Lordships cannot accede to this contention. The powers given to the court by the section are in terms given subject to the provisions of the Act, and, therefore, subject to the provisions of sects. 48 and 49. The court has no more power under the sections to waive the payment of the interest than it has to waive the payment of any tax imposed by the Act, or to impose a greater rate of interest or a larger amount of tax than the Act provides. The section is merely an enactment conferring upon the Exchequer Court exclusively the jurisdiction of dealing with disputes arising in connection with assessments made under the Act, and, as regards tax, interest and penalties, its powers are confined to seeing that they are only charged in strict accordance with the Act. As regards costs, the court has no doubt a complete discretion.

For these reasons, their Lordships are of opinion, and will humbly advise His Majesty, that the appeal should be allowed, that the judgment of the Supreme Court of Dec. 19, 1938, should be discharged, and the judgment of the Exchequer Court of Jan. 4, 1938, restored. The respondents must pay the appellant's costs of this appeal and of the appeal to the Supreme Court.

Appeal allowed with costs.

Solicitors: *Charles Russell & Co.* (for the appellants); *Blake & Redden* (for the respondents).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

PROVENDER MILLERS (WINCHESTER), LTD. *v.* SOUTHAMPTON COUNTY COUNCIL.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **October 23, 24, 25, 26, 1939.**]

Public Authorities—Exercise of statutory powers—Damage to riparian owners—Possibility of alternative method—Onus of proof.

Waters and Watercourses—Riparian owners—Interference with flow of water by works executed under statutory powers—Reasonable steps to avoid interference—Onus of proof.

The respondent company and their predecessors in business had for many years carried on the business of millers at a mill which was situated on a river and which derived its water power from that river. The appellant council were responsible for the upkeep of a bridge carrying the highway over a stream which ran parallel to the river, and for the protection of the bridge, and, acting under statutory powers, the appellant council rebuilt an existing culvert so as to give greater support to the road, and also made an entirely new culvert, so as to provide a means of outlet for flood water :—

HELD : (i) the appellants had failed to show that, for the purpose of protecting themselves against flooding, it was necessary to effect a permanent diminution in the quantity of water going to the respondents' mill.

(ii) in carrying out works of protection, it is not legitimate to alter the alveus of the stream.

(iii) the making of a new watercourse is a different matter from the mere removal of an obstruction.

(iv) the appellants failed to discharge the onus resting upon them of showing that the repairing of the bridge and the protecting of the highway against flooding could not have been done without permanently altering the normal flow of the river to the prejudice of persons interested in that flow.

Decision of FARWELL, J. ([1939] 3 All E.R. 882) *affirmed.*

[EDITORIAL NOTE. Public authorities in the exercise of their statutory duties are bound to have regard to the rights of other parties, unless, without negligence, they have followed the method in which the statute prescribes that the duty is to be performed, or expressly exempts them from the results of the interference with such rights. The point in the present case was that no one would have expected the works carried out by the appellant council to affect the respondents' mill, but, the execution of the works having had that effect, the appellant council are liable to the respondents.

AS TO LIABILITY OF PUBLIC AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 261-263, paras. 574, 575 ; and FOR CASES, see DIGEST, Vol. 38, pp. 38-50, Nos. 225-291.]

Cases referred to :

(1) *East Fremantle Corpn.* v. *Annois*, [1902] A.C. 213 ; 38 Digest 28, *158* ; 71 L.J.P.C. 39 ; 85 L.T. 732.

(2) *Manchester Corpn.* v. *Farnworth*, [1930] A.C. 171 ; Digest Supp. ; 99 L.J.K.B. 83 ; 142 L.T. 145.

(3) *Mason* v. *Shrewsbury & Hereford Ry. Co.* (1871), L.R. 6 Q.B. 578 ; 38 Digest 413, *1026* ; 40 L.J.Q.B. 293 ; 25 L.T. 239.

(4) *Gerrard* v. *Crowe*, [1921] 1 A.C. 395 ; 44 Digest 84, *652* ; 90 L.J.P.C. 42 ; 124 L.T. 486.

(5) *Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing & Finishing Co.*, [1927] A.C. 226 ; 38 Digest 398, *919* ; 96 L.J.P.C. 25 ; 136 L.T. 417.

(6) *Great Central Ry. Co.* v. *Hewlett*, [1916] 2 A.C. 511 ; 38 Digest 354, *594* ; 85 L.J.K.B. 1705 ; 115 L.T. 349.

(7) *Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L.T. 425 ; 26 Digest 265, *65*.

(8) *Sharpness New Docks and Gloucester & Birmingham Navigation Co.* v. *A.-G.*, [1915] A.C. 654 ; 26 Digest 581, *2716* ; 84 L.J.K.B. 907 ; 112 L.T. 826 ; *revsg.* [1914] 3 K.B. 1.

APPEAL by the defendants from an order of FARWELL, J., dated July 18, 1939, and reported [1939] 3 All E.R. 882, where the facts are fully set out.

J. M. Gover, K.C., *Roger W. Turnbull* and *G. T. Hesketh* for the appellants.

C. E. Harman, K.C., and *Wilfrid M. Hunt* for the respondents.

Gover, K.C. : The effect of the rebuilding of the bridge was appreciably to diminish the flow of water to the respondents' mill. Apart from their being a statutory body, performing a statutory duty, the council, as ordinary riparian owners, were legally entitled to do what they in fact did, in order to avoid interference with their property by floods, notwithstanding that by so doing they might interfere with the rights of a third person to some extent. The flow from the old bridges or culverts was not the natural flow of the stream, but it was artificially restricted and held up by the structure of the old bridges for the purposes of the bridge authority as riparian owners. Regarded as riparian owners, the council were entitled to remove that restriction or obstruction, and were under no obligation to continue it for the benefit of the respondents, whom it had, in fact, benefited. The respondents do not claim, and never have claimed, an easement. The statute authorises the reconstruction of a bridge of any proper dimensions, even though it alters the flow of the stream. The statute authorises a local authority to remove a bridge. The work done by the council was done by them in the execution of a public trust and for the public benefit, in pursuance of statutory duties and powers. If the work was done in a reasonable and proper manner, it could not be actionable at the suit of a third person. In ordinary circumstances, a riparian owner is entitled to guard himself against floods by putting up a wall on his own land, even though the result may be to direct the water on to the land of a lower riparian owner. The present is the converse case—namely, the removing of walls farther back, thereby avoiding the results of flooding. A riparian owner is entitled to do that notwithstanding that it causes damage to other riparian owners. A riparian owner is entitled to remove his dam. If, as dominant owners, the council decide to remove the obstruction, they may do so. The respondents say that they are entitled by prescription to a continuance of the holding up of the water. The answer is that the respondents, as servient owners, cannot require the council to maintain something which was erected for the council's purposes. *Mason* v. *Shrewsbury & Hereford Ry. Co.* (3) is an authority for saying that discontinuance by the council was not a cause of complaint. As regards the position of the council as a statutory authority, the council have a statutory power to remove a bridge entirely. In any event, the council have acted within the principle stated by LORD MACNAGHTEN in *East Fremantle Corpn.* v. *Annois* (1). That case shows the limit of the liability of statutory bodies, in that they are not liable for damage caused if the work they have done under their statutory powers has been done properly. In the present case, the evidence shows that there was no other reasonably practicable way of doing the work, in the circumstances. [Counsel referred to *Manchester Corpn.* v. *Farnworth* (2), *Gerrard* v. *Crowe* (4), *Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing & Finishing Co.* (5), *Great Central Ry. Co.* v. *Hewlett* (6), *Sandgate Urban District Council* v. *Kent County Council* (7) and *Sharpness New Docks and Gloucester & Birmingham Navigation Co.* v. *A.-G.* (8).]

Counsel for the respondent company was not called upon.

SIR WILFRID GREENE, M.R.: The points that were taken before us fall into two categories. The first category deals with the matter apart from any statutory rights or duties, and the second category deals with the matter in the light of the statutory obligations and the statutory powers which the appellants admittedly have. I must say a word or two about both those matters. I shall say a little more about the first than about the second, because, with regard to the first, FARWELL, J., has not gone into details of the argument, but has merely rejected it. In my opinion, he rightly rejected that branch of the argument. Before I come to deal with it, there is one matter on which I should say a word or two. The case made out in the statement of claim with regard to the nature of the Abbey Mill Stream was that it was a natural stream. In the defence, that allegation was contested, and it was asserted that it was an artificial stream. The respondents, who were the plaintiffs below, certainly at one stage in the case quite definitely accepted the view that the stream was an artificial one, and that acceptance was not commented upon, so far as I understand, in any way by counsel for the present appellants, for the very good reason that, on the case that he was presenting to the court, it was quite immaterial whether the stream was artificial or natural. He was not putting before the court an alternative argument based on the view, which in any case would have been inconsistent with his pleading, that the stream was a natural one. At one time I thought the question whether the stream was a natural or an artificial one might be a matter of importance, but I am now satisfied that the answer to this branch of the appellants' argument is the same on either hypothesis.

The argument is broadly of this nature. The appellants are treated, and I think for this purpose may properly be treated, as riparian owners, and it is said, first, that as riparian owners they are entitled to protect themselves against the flooding of their land, and that the work which they have carried out is that of protecting their land from flood water. Secondly, it is said that, apart from the question of flooding, every riparian owner, whether the stream be artificial or whether it be natural, is entitled to remove an artificial obstruction which is placed in the watercourse. In the case of an artificial stream, of course, that must be subject to the facts that the right to the water in an artificial stream depends either upon the scope of the grant or upon the quantity of water which has in fact been enjoyed during a period of prescription, and that the removal of any obstruction can be carried out only if it does not give to the person concerned a greater flow of water than that to which he is entitled. Subject to that qualification, I am prepared to accept the proposition that an artificial obstruction can properly be removed.

When one looks at the matter from the point of view of protection against flood, the first point to notice is that what the defendants have done is something far more than protecting themselves against flood. That is a point which comes into prominence very particularly in dealing with the second category of argument which was presented, because there it becomes of great materiality. It is sufficient in this context to say that, assuming that the appellants are entitled to protect themselves against flooding, that does not mean that they are entitled to execute works which not merely protect them against flooding but also increase the daily flow of the water in the watercourse to the prejudice of another person who has interests in the water. That applies to every stream, whether it be natural or whether it be artificial, and, as will appear later, the appellants have entirely failed to show that, for the purpose of protecting themselves against flooding, it was necessary to effect a permanent diminution in the quantity of water going to the respondents' mill. That reason alone appears to me to dispose of that particular argument, but there is another reason, which is equally cogent, to my mind. It is that, accepting the proposition that a riparian owner, whether on a natural or on an artificial stream, is entitled to protect himself against flooding, his right in that respect does not extend, and no authority was cited which suggests that it possibly could extend, to an alteration in the alveus of the stream, at any rate, an alteration which affects the normal flow. True it is that the building of walls and embankments may be legitimate in protecting land against floods, even if the effect of building them is to throw flood water on to your neighbour's land, but the one thing which the authorities appear to make quite clear is that, in carrying out works of protection, it is not legitimate to alter the alveus of the stream. What has been done here is precisely that. The appellants have not only increased the size of the alveus of that portion of the stream which comes down from Buskett Lane but they have also made an entirely new alveus to carry the water of the Hants and Dorset Stream, which had previously run into the Buskett Lane Stream towards the north side of the Broadway. That water is now carried by a new and separate culvert parallel to the culvert carrying the Buskett Lane water into the Abbey Mill Stream on the south side of the Broadway. That, as I have said, is an entirely new alveus, made where, so far as the evidence goes, no water had ever flowed before, and having the effect not merely of protecting the appellants' land from A flooding but also of performing a function which goes far beyond that and was unnecessary for that purpose—namely, of permanently diminishing the flow of water in the main stream of the River Itchen. Whether the stream be natural or whether it be artificial, it appears to me that what the appellants have done cannot be justified on any principle of B law which entitles riparian owners to protect themselves against flooding.

Then it is said that what they have done is to remove an artificial obstruction which in fact interfered with the natural flow of the water in those two branches of the Abbey Mill Stream. If the stream be an C artificial stream, there is no evidence that the watercourse was at any stage larger than it was before the old culvert was constructed. So far as any evidence goes, the culvert, or something of the same dimensions, may have been there all along, and, if the stream was an artificial one, of course, the measure of the water rights would be determined by the D capacity of the artificial work. Therefore, if it be an artificial stream, I cannot accept the proposition that the so-called removal of obstruction would be legitimate in the absence of proof that that was an obstruction which interfered with the water rights of those interested in the artificial stream. If the stream be a natural stream, again there is no evidence E as to what the dimensions of that natural stream were before the culvert, or some previous work, was made. It may be that the stream at that point was a narrow stream, and did not allow the water to pass freely. Counsel for the appellants invited us to speculate as to what the situation might have been in remote antiquity, but there is no evidence about F it, and I do not think it would be legitimate for this court to draw any inferences as to what the natural bed of the stream, if it were natural at that point, was before the culvert was built. I put that aside, because, in my view, it is not necessary to enter into that question, in view of the fact that what the appellants have done cannot with any G accuracy of language be described as the removal of an obstruction. This is not like a case where the piers of a bridge in a river have been removed and a new bridge with a single span and no piers has been thrown across the river, as counsel for the appellants suggested that it was. It is something of a quite different character. No doubt the H construction which covered the watercourse was technically a bridge. In point of fact, from another and perhaps more accurate physical point of view, there was merely a covered watercourse. What the appellants have done, as I have already said, is not merely to substitute a new cover of that watercourse for the old one, but to make a new watercourse in the way which I have already described. That, in my judgment, cannot by

any stretch of language be described as the removal of an obstruction
in a watercourse. It is something of quite a different character.

I have dealt at some length with this branch of the argument in
deference to what was put before us by counsel for the appellants, and
particularly in view of the fact that FARWELL, J., did not accept it, and
did not give reasons for taking that course. In my judgment, he was A
right in taking the course which he did, and, if he did not go fully into
the matter, it was no doubt for the reason, with which I entirely
sympathise, that the argument, when developed, will not really bear
examination.

The other branch of the argument dealt with the point of statutory B
duty. It was suggested that FARWELL, J., had misdirected himself
and that he had taken a view of the evidence which could not be supported.
On this branch of the case, without attempting to put my
language with exact precision, the position may be stated thus. The
appellants, being under a statutory duty to repair bridges carried by C
county highways and to keep the county highway in repair, and in
particular to protect it against flooding, set themselves to perform that
task, which was admittedly necessary. That being the task, what they
have actually done is something beyond what their duty imposed upon
them, because they have not only rebuilt the bridge—that is right— D
they have not only protected the highway against flood water—that is
right—but they have also gone further and effected a permanent alteration
in the natural flow of the stream. Having, therefore, done something
which goes beyond their duty, it is for them, and admittedly it
is for them, to justify that excess. If the statutory duty could only E
have been performed (and when I say that I mean from a reasonable
point of view, and without calling in the aid of extravagant devices,
or anything of that kind) by going to that excess, the appellants would
have been under no liability, because then they could truly have said
that what they had done was the only reasonable thing that they could F
have done in the performance of their duty, and that, if, in order to
perform that duty, they had at the same time to go beyond its exact
limits, that would be a matter of which the respondents could not complain.
FARWELL, J., in my opinion, correctly stated the law, and
appreciated the facts correctly. He found that the appellants had really G
made no attempt to discharge the burden upon them of showing that
the statutory object of repairing the bridge and protecting the highway
against flooding could not reasonably have been achieved without going
to the further point of permanently altering the normal flow of the
river to the prejudice of persons interested in the water flowing down H
the River Itchen. If any complaint could be made against the judgment
of FARWELL, J., on this part of the case, speaking for myself, I should
have thought that it would be that he had not really put the matter
high enough. I say this because, not merely was no real attempt made
to prove that point, but it seems to me that the evidence of the experts,

when properly considered, shows that it would have been possible and easy so to lay out the work as to afford the requisite protection against flood water without at the same time affecting the normal flow in normal times. The real fact of the matter was, as FARWELL, J., points out, that the existence of any such problem was never present to the minds
A of those concerned with the preparation and execution of this work. It never occurred to them that in carrying out the work they must consider whether or not it would alter the flow of water in the River Itchen going to the respondents' mill, or whether that could be avoided without at the same time interfering with the legitimate work required
B for protecting the highway against flooding. They never thought that such a problem existed, and accordingly they never set their minds to the solution of it, and, when the evidence came to be given, it is evidence which I must confess would have satisfied me, not merely that the burden of proof was not discharged, but also that the contrary was
C established. However, it is not necessary to go as far as that. FARWELL, J., not being satisfied that the burden had been discharged, quite rightly took the view that the appellants on this argument were in the wrong.

I do not think that there is any other matter to which I need refer.
D Certain authorities were referred to, and the fact that I do not mention them or examine them does not mean that I did not very carefully attend to them when they were being read. In my judgment, they do not assist the arguments put forward by the appellants, nor in any way do they impugn the statements of law contained in the judgment of
E FARWELL, J. The appeal fails, and must be dismissed with costs.

CLAUSON, L.J.: I agree with the judgment which has just been delivered by SIR WILFRID GREENE, M.R. In this court, we have pursued the matter on the footing that the case may properly be examined on
F the two alternative views (i) that the Abbey Stream is an artificial stream, and (ii) that it is a natural stream. FARWELL, J., based his judgment upon the view that the stream was an artificial stream, and I would say merely that I think that, in view of the form of the pleadings and of the way the case was debated, FARWELL, J., was quite
G within his rights in treating it as common ground that the stream was artificial, and dealing with it on that footing. As SIR WILFRID GREENE, M.R., has explained, and I am in entire agreement with him, as a matter of law the difference in the present case does not appear to be material.

The other thing I wish to say is that it was suggested in the court
H below that there was some inconsistency between the statement of the law by LORD MACNAGHTEN in *East Fremantle Corpn.* v. *Annois* (1) in the Privy Council and the statement of the law by LORD DUNEDIN in *Manchester Corpn.* v. *Farnworth* (2) in the House of Lords. In my view, there is no inconsistency at all in those two statements. I agree entirely with the way in which FARWELL, J., has put it—namely, that

LORD MACNAGHTEN was dealing with a different case, which did not involve considering the proposition which was fully stated by LORD DUNEDIN in *Manchester Corpn.* v. *Farnworth* (2)—and I am content to say that I agree entirely in the view of the law so carefully expressed by FARWELL, J., in the court below.

GODDARD, L.J.: I agree, and do not desire to add anything.

Appeal dismissed with costs.

Solicitors: *Robbins, Olivey & Lake*, agents for *F. V. Barber*, clerk to the County Council, Winchester (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Bell, Pope, Bridgwater & Hughes*, Southampton (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

R. *v.* WINFIELD.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **October 10, 1939.**]

Criminal Law—Evidence—Character of accused—Accused calling evidence restricted to his character in regard to women—Evidence of general bad character admissible.

A prisoner, charged with indecent assault upon a woman, called evidence as to his character in relation to women. The prosecution then gave evidence of his general character, which was bad. It was contended that the evidence as to his general character was improperly admitted:—

HELD: the evidence was properly admitted, since the accused, by calling such evidence, puts his whole character in issue.

[**EDITORIAL NOTE.** The point of this decision is aptly summed up in the words of the judgment: "There is no such thing known to our procedure as putting half your character in issue."

AS TO EVIDENCE OF CHARACTER, see HALSBURY, Hailsham Edn., Vol. 9, pp. 188-190, paras. 271-273; and FOR CASES, see DIGEST, Vol. 14, pp. 361-364, Nos. 3818-3856.]

APPEAL from a conviction at the Middlesex Sessions of indecent assault upon a woman. The accused called evidence of his good character in relation to women, whereupon the court allowed him to be cross-examined as to his general character. He was convicted, and appealed on the ground, *inter alia*, that he was improperly cross-examined as to his character.

J. C. Burge for the appellant.

G. G. Raphael for the Crown.

HUMPHREYS, J. [delivering the judgment of the court]: This appellant, Albert George Winfield, was found guilty by a jury at the Middlesex Sessions of a charge of indecent assault upon a perfectly respectable married woman in her house. He now appeals against his conviction by leave of this court. Two points are taken by his counsel. The first is that his character, which was a bad one, was allowed to be introduced improperly during the course of the trial. In the opinion of this court, there is nothing in that. The prosecution did not seek to introduce his character in any shape or form. What happened was this. He insisted upon calling a witness, against the advice of the deputy chairman, to ask her about his character in regard to women. The deputy chairman knew, though probably the prisoner did not, that there is no such thing known to our procedure as putting half your character in issue and leaving out the other half. A man is not entitled to say, "Well, I may have a bad character as a dishonest rogue, but at all events nobody has ever said that I have acted indecently towards women." That cannot be done. If a man who is accused chooses to put his character in issue, he must take the consequences. It is quite clear that this man did. He asked questions about his character quite apart from the facts of this case. The result was that he was properly cross-examined as to character.

The appeal was, however, allowed and conviction quashed on the ground of want of corroboration.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Legal Department*, New Scotland Yard (for the Crown).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

HOLLOWAY *v.* POPLAR BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Asquith, J.), **October 24, 26, 1939.**]

Local Government—Gratuity to employee dismissed on ground of ill-health—Resolution to grant—Enforceability by employee—Resolution to pay gratuity in weekly instalments—Whether ultra vires—Poplar Borough Council Superannuation and Pensions Act, 1911 (*c. cii*), *s.* 8 (2).

The defendants were empowered by a local Act to grant a gratuity not exceeding twice the amount of his salary at the time of the determination of his employment (payable out of the general rate, and not out of the superannuation fund) to any employee losing his office by reason of ill-health. The defendants in pursuance of that power passed a resolution granting to the plaintiff a gratuity of £268 16*s.* 10*d.*, and the resolution continued: "the distribution thereof be at the rate of 10*s.* per week, provided that, in the event of the decease before the total amount of the gratuity is paid, particulars of any dependants shall be reported to the Finance Committee for their consideration and direction." The council made weekly payments amounting to £9 10*s.*, and then the plaintiff claimed the immediate payment of the whole balance, contending that, upon the passing of the resolution, he acquired a legal right to the payment of the whole amount:—

HELD: (i) the passing of the resolution in pursuance of the Act did not create a contract or impose any legal obligation on the defendants to pay either the lump sum or the instalments.

(ii) the terms of the Act did not prevent the defendants from granting a gratuity payable by instalments.

[**EDITORIAL NOTE.** It should be noted that the payment to be made to the employee in this case was a gratuity, not a superannuation payment. The local Act was, therefore, purely permissive, and the payment was in the nature of an *ex gratia* payment and not a contractual obligation. Upon that view, the plaintiff could not bring any action in respect of it, as it was a sum paid voluntarily by the council and not one which he had such a right to receive as could be enforced by the court. A

AS TO VOLUNTARY OBLIGATIONS, see HALSBURY, Hailsham Edn., Vol. 7, p. 136, para. 195; and FOR CASES, see DIGEST, Vol. 12, pp. 51-53, Nos. 277-298.]

Case referred to:

(1) *Marchant* v. *Lee Conservancy Board* (1874), L.R. 9 Exch. 60; 13 Digest 350, *888*; 43 L.J.Ex. 44; 30 L.T. 367. B

ACTION claiming £259 6*s.* 10*d.* from the defendant corporation. The facts are fully set out in the judgment.

Leonard Caplan for the plaintiff.

S. G. Turner, K.C., and *H. F. Bidder* (for *T. G. Talbot*, serving with H.M. forces) for the defendants. C

ASQUITH, J.: The plaintiff in this case was in the employ of the defendant corporation as a lavatory attendant, but was retired from his employment owing to ill-health. The Poplar Borough Council Superannuation and Pensions Act, 1911, s. 8 (2), provides as follows: D

> In any such case of loss of office or employment as in this section mentioned the council may also if they see fit grant to an officer a gratuity not exceeding twice the amount of his salary or wages and emoluments during the year ending on the quarter day which immediately precedes the day on which he ceases to hold his office or employment but every such gratuity shall be paid out of the general rate and not out of the superannuation fund. E

The words "such case of loss of office as in this section mentioned" refer to the previous subsection of this provision, and sect. 8 (1) (*c*) refers to loss of office caused, *inter alia*, by ill-health. The plaintiff's loss of office was, therefore, such a loss of office as is contemplated in sect. 8 (2). F

Acting under that subsection, on June 23, 1938, the Poplar Borough Council passed a resolution to the following effect:

> That a gratuity of £268 16*s.* 10*d.* be granted out of the general rate fund [to the plaintiff] and that the distribution thereof be at the rate of 10*s.* per week, provided that in the event of the decease before the total amount of the gratuity is paid, particulars of any dependants shall be reported to the Finance Committee for their consideration and direction. G

The council, acting on their resolution, proceeded to pay the plaintiff 10*s.* per week until they had paid in all £9 10*s.* At that stage, the plaintiff brought the present claim, whereby, subject to giving credit for the £9 10*s.* already received, he claims immediate payment of the whole balance of the gratuity—namely, £259 6*s.* 10*d.* H

This claim necessarily implies that, under sect. 8 (2), not only are the defendants empowered to grant gratuities out of the general rate, but also any grantee of the gratuity acquires, once the necessary resolution is passed, a legal right to proceed against them for payment thereof. If the plaintiff succeeds in showing this, he must go further and establish that the defendants have not satisfied their obligation by paying the 10*s.* weekly in accordance with their resolution, but that they were bound in the first instance to pay the gratuity in a lump sum, and are still bound to pay the balance of it in that form. To succeed in this, again, the A plaintiff must show that such parts, and such parts only, of the resolution as provided for the payment by 10*s.* instalments are *ultra vires* sect. 8 (2). If the resolution were bad as a whole, he could, of course, have no claim. Accordingly, he seeks to show that the resolution, so far as it provides "That a gratuity of £268 16*s.* 10*d.* be granted out of the general rate B fund" to the plaintiff, is *intra vires*, but that the succeeding words—namely, "that the distribution thereof be at the rate of 10*s.* per week," etc.—are *ultra vires*, and that these parts of the resolution are mutually severable.

The first point is whether the subsection confers any legal right at all C on the person to whom the defendants resolve that a gratuity shall be paid, or whether it merely empowers the defendants to pay a gratuity out of the general rate without imposing upon them any obligation. There must be many clauses in local and private Acts with wording substantially similar to that of sect. 8 (2) of this Act, but counsel could D not cite to me, nor could I discover any direct authority on the point in question. It is clear that there is no contract, if only because there is no consideration. The only authority cited by counsel on either side as having even an indirect bearing on the point was *Marchant* v. *Lee Conservancy Board* (1). In this case, the board was empowered by the E Lee River Navigation Improvement Act, 1850, s. 76:

> . . . from time to time to pay and allow to any officer or servant of the trustees whose services may . . . be no longer required . . . such annuity or other allowance as . . . may, in the judgment of the trustees, be reasonable and proper; and the trustees may from time to time pay and allow such annuity or allowance out of the moneys which may come to their hands . . .

F The trustees, acting under this section, by resolution not under seal, granted to a retired servant an annuity of £300 a year. The board subsequently passed a resolution reducing the amount by half, and paid £37 10*s.* only for the next quarter, and the plaintiff sued for the balance. The court of first instance held that the annuity originally granted could G not be reduced in amount. On appeal, the Exchequer Chamber reversed this decision, holding that the trustees were entitled to reduce the amount. The argument centred mainly on the validity or non-validity of the reducing resolution. The court decided that it was *intra vires*, and the reduction was, therefore, effective. The inference drawn from H this by counsel for the plaintiff is that the court assumed that the section conferred rights on the plaintiff. Otherwise they would simply have said, "It matters not whether the second resolution was *intra vires*. The plaintiff never had a legal right to his annuity at all, and the defendants could at any time not only reduce but abolish it." This is admitted to be but an oblique inference from the language of the

Exchequer Chamber, but it is noteworthy that that court did say in the course of its judgment, at p. 63:

> It is argued indeed that the resolution was binding as a grant . . . but from that construction of the section [sect. 76 of the 1850 Act] I entirely dissent; it conferred a power upon them, but it imposed no obligation.

The judge goes on to say that there was no contract and no consideration. He said at p. 63:

> The resolution conferred a mere bounty on the plaintiff; the elements of a contract are entirely wanting.

The court held that the section in that case imposed no obligation on the defendants. In other words, it gave the plaintiff no legal right to the annuity. I think that the same holds good of the subsection in the present case, and the authority cited is really an authority against the plaintiff. The resolution is not a grant. It does not create nor supply evidence of a contract. It imposes no obligation on the defendants. It merely empowers them to do what they could not otherwise have done—that is, draw on the general rate for a specific purpose.

If I am right in this, it disposes of the whole claim. If I am wrong, the question arises whether the plaintiff's construction of cl. 8 (2) can be maintained. He contends that it confers no power to provide that any gratuity granted shall be payable by instalments, and, in support of this submission, he argues, first, that to grant an annuity so payable is to grant several annuities, whereas the subsection speaks of "a" gratuity, meaning a single sum payable once and for all. The provision in the Interpretation Act, 1889, that single words include the plural, is, I think, a sufficient answer to this point, though in my view a gratuity payable in instalments is not several gratuities. Secondly, he argues that, because the maximum that a gratuity must not exceed is expressed in terms of a lump sum, and not in terms of a periodical payment by the week or otherwise, therefore the gratuity itself must be payable in a lump sum, and not in weekly or other instalments. That seems to me a *non sequitur.*

Lastly, under this head the plaintiff says that a private or local Act prohibits that which it does not expressly or by necessary implication authorise, and that it does not expressly or by necessary implication in this case authorise payment of the gratuity in instalments. Hence, he argues, that part of the resolution which provides for the payment in instalments is *ultra vires,* and the resolution should be read without it. Whether or not the rule of construction relied upon has been accurately stated, and whether or not it applies to a corporation such as the defendants in this case, I do not think that it has any bearing on the issue I am considering, since I read the term "gratuity" as being wide enough to cover any money gratuitously granted or paid, whether it is paid in one sum or paid in instalments. Even if the argument were sound, the plaintiff might have difficulty in establishing that the two limbs of the resolution are mutually severable. For these reasons, the claim, though ingeniously argued, must be dismissed with costs.

Action dismissed with costs.

Solicitors: *Kenneth Duthie & Co.* (for the plaintiff); *W. H. Thompson* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

A. *v.* B.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Slesser, Clauson, MacKinnon, du Parcq and Goddard, L.JJ.), **October 20, 23, November 6, 1939.**]

Emergency Legislation—Execution on judgment—Discretion of court—Principles on which discretion exercised—Existence of other debts—Courts (Emergency Powers) Act, 1939 (c. 67), *s.* 1.

Execution—Leave to issue—Under Courts (Emergency Powers) Act, 1939—*Discretion of court—Existence of other debts—Courts (Emergency Powers) Act,* 1939 (*c.* 67), *s.* 1.

On Sept. 25, 1939, the respondents signed judgment in default in respect of £836 14*s.* 1*d.* due from the appellant company on certain bills of exchange. On Sept. 26, 1939, they issued a summons under the Courts (Emergency Powers) Act, 1939, for leave to proceed to execution on, or otherwise to the enforcement of, that judgment. The appellants' business was that of selling furniture, mainly upon hire-purchase terms and with the aid of loans from finance companies. This business had suffered very seriously by reason of the outbreak of war. There were a number of other creditors of the appellant company, and it was stated that, if any creditor was given leave to enforce a judgment against the appellant company, the result would be very harmful to the company and its shareholders:—

HELD: (i) an application of this nature must be decided upon the particular facts of each case, and those facts must show that the resources of the applicant are insufficient to satisfy the judgment in question.

(ii) it is not sufficient to establish that the debtor has a sum of money available sufficient to pay the debt. The words " is unable immediately to do so by reason of circumstances directly or indirectly attributable to " the war must be construed in a reasonable and commonsense way, and the existence of other debts is not an irrelevant consideration.

(iii) on the other hand, the Act is not one passed for the benefit of creditors generally, and, in considering the relevance and importance of the existence of other debts, the court is not exercising a quasi-bankruptcy jurisdiction.

[**EDITORIAL NOTE.** In normal times, a plaintiff who has secured a judgment in his favour may proceed to issue execution thereon. It has been thought necessary to protect a judgment debtor who has been adversely affected by the war. The provisions of the Act here in question are, therefore, directed primarily to the relief of the debtor, and are not intended to benefit the general body of the debtor's creditors. In exercising its discretion to grant leave to issue execution, the court is not exercising a bankruptcy jurisdiction, in which the main consideration would be the equitable distribution of the debtor's assets among the creditors, but is exercising a jurisdiction designed to prevent the infliction of hardship upon the debtor. At the same time, it is held that the existence of debts other than the judgment debt is a matter which the court may take into account in the discharge of its duty to consider all the circumstances of the case.

As to Leave to Issue Execution, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, para. 13; and for Cases, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

Case referred to:

(1) *Tennants (Lancashire), Ltd.* v. *Wilson (C. S.) & Co., Ltd.*, [1917] A.C. 495; 12 Digest 396, *3216*; 86 L.J.K.B. 1191; 116 L.T. 780; *revsg.* S.C. *sub nom. Wilson & Co.* v. *Tennants (Lancashire), Ltd.*, [1917] 1 K.B. 208. A

Interlocutory Appeal by the defendants from an order of Oliver, J., made in chambers on Oct. 17, reversing an order made by Master Jelf and giving leave to proceed to issue execution on a judgment obtained B against the appellants. The appellants admitted that their assets were sufficient to satisfy the judgment, but stated that, if they had paid the judgment debt, their other creditors would have gone unpaid. The question for decision was whether, under the Courts (Emergency Powers) Act, 1939, s. 1 (4), they were "unable immediately" to satisfy the C judgment "by reason of circumstances directly or indirectly attributable" to the war.

Valentine Holmes for the appellants.

R. F. Levy, K.C., and *L. Caplan* for the respondents.

Holmes: The judge was wrong in refusing to exercise his discretion. D If the appellants satisfied this judgment, they would have been unable to pay any of their other creditors. On a true construction of the statute, they were, therefore, "unable" to satisfy it. Otherwise the provision of the subsection is useless, for it would not begin to operate until the debtor was impecunious and execution was not worth while. Inability E to pay must depend on the whole of the circumstances.

Levy, K.C.: If the legislature had intended the result proposed by the appellants, it could easily have made the subsection apply to a person who was unable immediately to pay his debts.

Holmes in reply. F

Sir Wilfrid Greene, M.R. [delivering the judgment of the court]: This is an appeal by the defendants in the action from an order of Oliver, J., allowing an appeal from a decision of Master Jelf upon an application by the plaintiffs under the Courts (Emergency Powers) Act, G 1939. The action was begun by specially indorsed writ, dated Sept. 13, 1939, by which the respondents claimed against the appellants as acceptors the sum of £836 14*s.* 1*d.* due on certain bills of exchange which had been dishonoured. No appearance to the writ was entered, and on Sept. 25, 1939, the respondents signed judgment in default. H

On Sept. 26, 1939, the respondents issued a summons under the Courts (Emergency Powers) Act, 1939, for leave to proceed to execution on, or otherwise to the enforcement of, the judgment. By sect. 1 (1) of that Act, no person is entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether given or made before or after the commencement of the Act) for the payment or recovery of a sum of money, with certain exceptions there mentioned, including in particular any judgment or order for the recovery of a debt becoming due by virtue of a contract made after the commencement of the Act. Sect. 1 (2) provides that no person shall be entitled, except with the leave of the appropriate court, to proceed to exercise any remedies which are available to him, such as the levying of distress, or the taking of possession, or the entry upon any land, or the institution of proceedings for foreclosure. To the provisions of this subsection also there are certain exceptions. Sect. 1 (3) provides that no person shall be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, judgments or orders for the recovery of possession of land in default of payment of rent, with an exception in the case of contracts made after the commencement of the Act.

The crucial provisions are found in sect. 1 (4), which provides as follows:

> If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in subsects. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper.

Sect. 1 (5) provides for the case of bankruptcy petitions and winding-up petitions presented against a company on the ground that it is unable to pay its debts. In such cases, if the debtor or company proves to the satisfaction of the court having jurisdiction in those matters that:

> . . . his or its inability to pay his or its debts is due to circumstances directly or indirectly attributable to any war in which His Majesty is engaged, the court may at any time stay the proceedings under the petition. . . .

We need not refer to any of the other provisions of the Act.

It is clear that, where an application is made for leave to proceed to execution on, or otherwise to the enforcement of, a judgment of the kind mentioned, the burden of proving, first, that the defendant is unable immediately to satisfy the judgment, and, secondly, that that inability arises by reason of circumstances directly or indirectly attributable to the war, lies on the defendant. If he fails to establish these two facts, the discretionary power conferred upon the court by subsect. (4) never arises. The question, and the only question, which falls for decision upon this appeal is whether or not the appellants have discharged this burden. Master Jelf held that they had. Oliver, J., reversed his decision, and held that they had not.

It was suggested by counsel for the appellants that Oliver, J., really decided the matter, not by reference to the particular facts of this case, but according to some general principle which counsel maintained was bad in law. Counsel for the respondents did not accept this view as to the grounds of the decision of Oliver, J. If, indeed, the decision of Oliver, J., was based on the grounds suggested by counsel for the appellants, we should not agree with it. However, we do not pause to consider this matter further, since, in our opinion, the only question which we in this court have to decide is whether or not the evidence put forward by the appellants in this particular case brings the case within the subsection. Counsel for the appellants endeavoured to treat the case as though it could be decided by reference to the bald and insufficient facts of an A.B. case. We decline so to approach the matter. In our view, nothing can be clearer than that each case which falls for decision under the subsection must be decided in relation to its own particular facts.

The only evidence put forward by the appellants consists of an affidavit sworn by their chairman and managing director. From that affidavit it appears that the appellants' business is that of selling furniture, in the main on hire-purchase terms. It shows that the appellants' business has suffered very seriously by reason of the outbreak of war. Receipts from hirers have fallen off. There has been a great decline in the volume of new business, and it cannot be doubted that the appellants have fallen into serious embarrassments. The appellants' finance is conducted by means of loans from finance companies, and the situation can be summarised in three extracts from the affidavit. In para. 11, it is stated that:

> . . . the accumulated result of these matters is that the company finds itself without sufficient resources to enable it to discharge the claims of the plaintiffs and its other creditors—a position the company has not experienced since its incorporation.

In para. 13, it is stated that:

> . . . if any creditor is given leave to enforce a judgment against the company the result will be very harmful to the company's creditors and disastrous to its shareholders.

In para. 15, it is submitted that the company is unable immediately to meet "its obligations," by reason of circumstances directly attributable to the war.

In our opinion, these allegations, which summarise the position of the appellants in relation to their creditors, are quite insufficient to establish what subsect. (4) requires to be established—namely, that they are unable immediately to satisfy this judgment. The affidavit makes no attempt to show that the resources of the appellants are insufficient to enable them to satisfy the judgment which the respondents have obtained against them. There is no exposition of the present actual financial position of the appellants, no statement of their assets, and a quite insufficient statement as to their liabilities.

In our opinion, as a general rule, in cases falling under these provisions of the Act, information of this character must be furnished, and the decision should be made in the light of all the facts. It is not to be thought from this that, if a judgment debtor is shown to have a sum of cash available to pay the debt, he thereby necessarily fails to establish that he is unable to satisfy it. So to hold would involve giving far too narrow a meaning to the word "unable," which must be construed in a reasonable and commonsense way. Moreover, we must not be taken to be laying it down that the existence of other debts is an irrelevant consideration. On the contrary, it is a matter which may be properly taken into account, although the weight to be given to it may vary very much in different cases. Moreover, in considering the relevance and importance of the fact that other debts exist, it must always be remembered that, if and when another creditor obtains a judgment and seeks to enforce it, the position of the debtor, at the date when leave is sought, will have to be considered in relation to that judgment, and that, if and when that eventuality arises, the court will be able to deal with it in accordance with the directions laid down in the section, in the light of the circumstances then existing, which may be very different, in one direction or the other, from those which exist at the date of the application under consideration.

Counsel for the appellants sought to treat the Act as one passed for the benefit of creditors generally, with a view to securing an equal distribution among them of the debtors' available assets, with the result that the court, in such a case as the present, would become involved in some sort of quasi-bankruptcy administration. As we read the section, its object is not that of the protection of creditors generally, but that of the protection of debtors against enforcement of judgments obtained against them, although, in exercising the jurisdiction, the matters to which we have referred must be taken into account and given proper weight.

In this connection, it is not without importance to observe the difference in language between subsect. (4) and subsect. (5). In subsect. (4), the fact which requires to be proved is inability to satisfy the judgment debt in respect of which the application is made. In subsect. (5), the phrase used is "inability to pay his or its debts." Counsel for the appellants relied on *Tennants (Lancashire), Ltd.* v. *C. S. Wilson & Co., Ltd.* (1). That was a case of a commercial contract, upon the true construction of which—and, in particular, of the word "hindering"—the decision turned, and we derive no assistance from it. Upon the facts which appear in the affidavit, therefore, we feel bound to hold that the appellants have not discharged the burden of proof. However, as this legislation is new, and the practice to be followed under it has not been settled, we think it right to give the appellants, if they desire it, an opportunity of putting in further and fuller evidence as to their financial position, as they may well have been under a misapprehension as to the sort of evidence required.

If the defendants desire to apply to have the matter sent back to the master in order to enable them to put in further evidence, we are prepared to give them the opportunity of doing so, but it would be necessary to frame the order so as to safeguard the respondents' interests. It would be most undesirable to permit the defendants to gain time by putting in insufficient evidence and then fighting the question of its insufficiency to this court. If the appellants wish to have such an opportunity, the order will be as follows: Suspend the operation of the order of OLIVER, J., save as regards costs, for seven days. If during that period the appellants pay into court the amount of the judgment debt, and also a further £50 as a provision towards costs, discharge the order of OLIVER, J., save as regards costs, and refer the summons back to the master, with liberty to the respondents to apply to the master for leave to enforce the judgment, or, in the alternative, for payment to them of the amount of the judgment debt out of the fund in court, and liberty to the respondents to apply to the master for leave to file further evidence. Order respondents' costs of this appeal to be paid by the appellants. The effect will be that, in default of payment into court within the time allowed, the order of OLIVER, J., will be operative, and the respondents will be free to enforce their judgment.

Leave to the appellants to file further evidence.

Solicitors: *Simmons & Simmons* (for the appellants); *Saunders, Sobell & Greenbury* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

KENT AND PORTER *v.* EAST SUFFOLK RIVERS CATCHMENT BOARD.

[COURT OF APPEAL (Slesser, MacKinnon and du Parcq, L.JJ.), **October 17, 18, November 3, 1939.**]

Land Drainage—Catchment board—River-wall—Duty to repair—Liability for misfeasance—Negligent repair—Land Drainage Act, 1930 (*c.* 44), *s.* 34.

The plaintiffs were the owners of land protected by a wall from inundation by a tidal river. At a time when the height of a spring flood tide was increased by a northerly gale, the wall partly collapsed, leaving a breach 20 ft. to 30 ft. wide. As a result, the plaintiffs' lands were flooded. The defendants, the catchment board for the area in which those lands were situated, attempted to repair the breach by running a dam straight across it. It was proved that this method of repair was impracticable and that the correct method was to construct a V-shaped dam. It was also proved that the defendants had attempted the work with an insufficient number of men:—

HELD: (i) the Land Drainage Act, 1930, s. 34, does not place upon a catchment board an imperative duty to repair a breach in a drainage work. The power is purely a permissive one.

(ii) while the catchment board were not liable for non-feasance, they were liable for misfeasance.

(iii) on the facts, the board had undertaken the work of repairing the breach, and they had done that work negligently. They were therefore liable in damages for the ensuing injury to the plaintiffs' land.

Per DU PARCQ, L.J., *dissenting:* the board was under no duty to do the work for the benefit of the plaintiffs with efficiency and despatch.

Decision of HILBERY, J. ([1939] 2 All E.R. 207) *affirmed.*

[**EDITORIAL NOTE.** It would appear to be now settled that the Land Drainage Act, 1930, s. 34, does not place upon a catchment board an imperative duty to repair a breach in a drainage work. The position arising where it in fact undertakes the repair of such a work has here given rise to a difference of opinion, the majority holding that, if it does undertake the work, then it must exercise reasonable care and skill in the performance of it.

As to Duties of Catchment Boards, see HALSBURY, Hailsham Edn., Vol. 30, pp. 76-79, paras. 143-148 ; and for Cases, see DIGEST, Supp., Sewers and Drains, No. 399a *et seq.*]

Cases referred to :

(1) *Sheppard* v. *Glossop Corpn.*, [1921] 3 K.B. 132 ; 38 Digest 34, *207* ; 90 L.J.K.B. 994 ; 125 L.T. 520.

(2) *Smith* v. *Cawdle Fen, Ely* (*Cambridge*), *Comrs.*, [1938] 4 All E.R. 64 ; Digest Supp. ; 160 L.T. 61.

(3) *Gillett* v. *Kent Rivers Catchment Board*, [1938] 4 All E.R. 810 ; Digest Supp.

(4) *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430 ; 43 Digest 1075, *116*.

(5) *Wilkinson* v. *Coverdale* (1793), 1 Esp. 74 ; 12 Digest 223, *1849*.

Appeal by the defendants from a judgment of Hilbery, J., dated Mar. 22, 1939, and reported [1939] 2 All E.R. 207, where the facts are fully set out.

Gilbert Beyfus, K.C., and *F. W. Beney* for the appellants.

G. Russell Vick, K.C., and *Robert Fortune* for the respondents.

Slesser, L.J. : In this case, the judge had held, for the reasons contained in his judgment, that the defendants have caused damage to the plaintiffs by the negligent exercise of their powers to repair a sea-wall, powers which are conferred upon them by the Land Drainage Act, 1930, s. 34. As a result of such negligence—namely, the failure properly to repair the wall—a breach, which was made on Dec. 1, 1936, was not filled so as to keep out the sea until May 28, 1937, a period of 178 days. It is not disputed that the prolonged incursion of sea-water very seriously affected the land as marsh pasturage. The judge is of opinion that by the exercise of reasonable skill the work could have been done and the flooding arrested in 14 days from the failure of the sea-wall. For the consequent injury to the marshlands by inundation for a further 164 days by salt water, ruinous to their use as marshland pasture, he has awarded damages to the owner and to the occupier-tenant of the farm.

On behalf of the appellants, reliance is placed upon sect. 34 of the 1930 Act, which says that the defendants, among other authorities, have power to repair or otherwise maintain the sea-walls, but have no duty so to do. It is argued that to make abortive and incompetent efforts before achieving the final successful result is no more than to delay the exercise of their power, and is a mere non-feasance, for which in law they are not liable. It is now beyond argument that a body having powers but no duties conferred by statute can be under no liability if damage arises to a person by the mere failure to exercise that power :

Sheppard v. *Glossop Corpn.* (1), and the cases there cited, and *Smith* v. *Cawdle Fen, Ely* (*Cambridge*), *Comrs.* (2). It is elementary that actionable negligence cannot arise unless there is a duty. In the circumstances of this case, did the defendants by their conduct impose upon themselves such a duty?

There is no doubt that on Dec. 2 the clerk to the defendants told the plaintiff Porter, in answer to a complaint by him of the incursion of the sea-water and of a breach in the wall 25 ft. wide, that the board's attention had been directed to the matter. On Dec. 19, in answer to a letter from a Mr. Smith of Blaxhall, who had previously looked after the wall, and sought re-employment thereon, the defendants said that it was decided that the work should be carried out by the board's own workmen. Complaints by Mr. Porter were repeated on Dec. 18, 1936, and Jan. 5, 1937. By Jan. 30, the defendants, through their officer, admit that their work had been ineffective, and that the tide had twice washed away the piling since Jan. 11. Again on Mar. 3 Mr. Porter complained, and on Apr. 8 Mr. Kent, the owner, said that the breach was 30 yds. wide. At all these times—indeed, until May 28—I am satisfied that the defendants undertook and attempted to do the work under their powers, and were continuously upon the plaintiffs' land for that purpose, a right having been expressly given them by sect. 34 of the 1930 Act to enter on the land for the purpose of maintaining existing works.

In my opinion, this case, on examination, resolves itself into a complaint, not of failure to exercise powers, but of damage done by their incompetent exercise. So far as minor damage is concerned—the strewing of bags and *débris* and piles upon the plaintiffs' land, the making of holes by scouring, and the use of the plaintiffs' existing wall to form material for the final successful curved wall made over the saltings—it is not disputed, apart from questions of absence of pleading, that the defendants might be liable as for a misfeasance, but it is argued that this does not apply to the far greater damage done by the defendants to the plaintiffs by their persistent user over a long period of an incompetent method, with consequent failure to fill the breach. This, it is said by the appellants, is but damage solely caused by delay in the exercise of powers, and, if so, is not actionable. This argument appears to me to be over-subtle. There was no delay in the initiation of the exercise of the powers. They were exercised early in December, when the defendants, in accordance with their statutory powers, entered upon the plaintiffs' land and started the abortive work. As to the damage, had the powers not been so negligently exercised, it is reasonable to suppose that the plaintiffs would not impotently have stood by, seeing the damage develop unchecked, but themselves would have called in Mr. Smith or some other expert, who would almost certainly have filled the gap by a competent method in some 14 days.

The crucial question arises, therefore, on all the facts, is it right to conclude that this damage was the result of the defendants delaying the exercise of their powers, or was it an exercising of their powers in a negligent manner so as to be actionable ? In my opinion, it was the latter, and the damage was due to their negligence in that, after Dec. 19 at the latest, the plaintiffs were induced, to their detriment, to rely upon the board's undertaking to do the work and themselves to abstain from doing it. Had the board done nothing, the plaintiffs could not have complained, but, once the board undertook to do, and did attempt to do, the work, and in the exercise of their powers entered upon the plaintiffs' land, drove piles into it, and bungled the work, that negligence was a continuing negligent exercise of their powers, and not solely an abstention from the exercise of them. For these reasons, in my opinion, this appeal fails.

MACKINNON, L.J. : The plaintiff Porter is the owner in fee of a farm to the south of the River Deben in Suffolk. The plaintiff Kent is the tenant-occupier of the farm. The Deben, below Woodbridge, is a tidal estuary. Some 50 acres of the farm in question are marshland pasture. This marshland is lower than the bed of the river—the result in part of alluvial deposit in the river, and in part of the secular drying up of the marsh. The marsh has for centuries been protected from the incursion of water from the river at high tide by a wall of earth. Until recently, no one was concerned to keep this wall in repair except the man who owned it, whose interest it was to maintain it in order to preserve his marshland from being flooded.

In 1926, Mr. Porter employed Mr. Smith, of Blaxhall, to put the wall in order and to repair a sluice. He paid him £546 for work upon his wall and £125 for the sluice. Smith, who gave evidence in the case, said that for many generations his family had been in business as marshmen and repairers of river-walls.

The Land Drainage Act, 1930, created various public bodies called drainage boards and catchment boards. One of the catchment boards is that for the East Suffolk rivers, which include the Deben, and that board is the defendant here. By sect. 6, the powers conferred on drainage boards shall, so far as concerns the main river and the banks thereof, be exercisable solely by the catchment board, and by sect. 34 a drainage board is given power to maintain existing works—that is to say, to cleanse, repair, or otherwise maintain in a due state of efficiency any existing watercourse or drainage work. A proviso enacts that nothing in this section authorises any person to enter on the land of any person except for the purpose of maintaining existing works.

There can be no question that this Act empowered the defendant board for the future to relieve Mr. Porter of the task of keeping the river-wall in an efficient state of repair so as to prevent the marsh pasture from being flooded at high tide. A layman might well imagine that, when a public body had been set up with this power, and furnished with public funds (to be provided by the county council), it would be their duty to exercise that power, and that Mr. Porter, or any other owner of part of the river-walls, would have grounds for complaint if they failed in such duty. The layman, however, would need to be instructed that it is well settled that a public authority that is empowered to do a thing, but not ordered to do it, may with impunity abstain from doing anything. In the catchwords of the doctrine, it is not liable for non-feasance.

On Dec. 1, 1936, there was a very high tide in the Deben, and Mr. Porter's river-wall gave way. A breach of some 25 ft. was created, and the water, which is almost undiluted sea-water, flooded the marshes. If this sea-water continued for a length of time to rush in at every high tide, the grass would be killed and the pasture ruined. It was imperative that the breach should be repaired as soon as possible, so that as soon as possible the water should drain off by the sluice and the pasture be more or less dried.

On the next day, Dec. 2, Mr. Porter reported this disaster. By a venial error he wrote to the clerk of the River Deben (Lower) Drainage Board. He ended his letter as follows:

> I must request your board to take immediate steps to repair the damage.

The error in the address was immaterial, for the clerk of the drainage board was also clerk of the catchment board. In the latter capacity, he replied on Dec. 3 as follows:

> The wall in question is a main wall, and comes under the jurisdiction of the catchment board, and I believe already has the attention of the board's surveyor.

This answer to Mr. Porter's request seems to me a clear intimation that the board were undertaking the task of repairing the wall, and an implied intimation that, under sect. 34 (4) of the Act of 1930, they were proposing to enter upon the land of Mr. Porter for the purpose of maintaining the existing work—namely, the wall.

The surveyor to the catchment board was Mr. Clark. Apparently on Dec. 3, Mr. Smith of Blaxhall, the man who had looked after the wall before, having seen this breach, wrote to the board in the hope of being employed to repair it. On Dec. 14, he had a reply from Mr. Clark as follows:

> In reply to your letter of 3rd instant, I placed this matter before my board on Tuesday last, when it was decided that the works should be carried out by the board's own workmen and not by contract.

One might suppose from the terms of this letter that the board had some sort of organisation for dealing with matters of this sort, and had its "own workmen." In truth, as appeared from the evidence, they had neither the one nor the other. The man Studd, to whom Mr. Clark entrusted the task of filling this breach, had been for eighteen months in the employment of the board, but he had had absolutely no experience of the work of stopping a breach. He had to get casual labourers, with no experience at all, from the local employment exchange, and he began work with two of them. He had one wheelbarrow, and later got another, or two more. He was given piles that were too short, and nothing to drive them with but a beetle. When he asked for a pile-driver, Mr. Clark said that it was too expensive. These are all items from the evidence of Studd on behalf of the plaintiffs.

I do not propose to go in detail into the evidence. I think it is clear that the work of Studd and the casual labourers was entirely incompetent. It is not surprising that on Dec. 21 Mr. Porter sent to the surveyor a bitter letter of complaint, dated Dec. 18, from Mr. Kent, the farmer :

> You must know what a serious matter it is for both you and me, as the water has been on so long that the grass will be killed, therefore the marshes will be useless. . . . Just fancy, they only have about four men, and they want quite fifty, and those are off the dole. None of them seem to know how to start the job, and no sooner do they put something in than the next tide washes it away.

No reply being sent to this, Mr. Porter wrote again on Jan. 5. Six days later, Mr. Clark wrote to say that " your previous letter of Dec. 21 appears to have been mislaid by me." He adds, " Unfortunately, owing to trouble with the men working on the job, I have had great difficulty," and ends by hoping that " this work will be completed to everyone's satisfaction at an early date." This is written on Jan. 11, when the tide had been flooding the marshland ever since Dec. 1. On Jan. 30, Mr. Clark wrote to say that since his letter of Jan. 11 the tide had twice washed away the ineffective piling. On Mar. 3, Mr. Porter wrote to the clerk to say that things were as bad as ever, and ended his letter by suggesting that Mr. Smith of Blaxhall, who repaired the wall for him in 1926, " might be able to assist your surveyor in this matter." Mr. Porter presumably did not know that Smith had offered his services on Dec. 3, and that on Dec. 14 the surveyor had replied that the board had decided that the work should be carried out by its " own workmen."

On Apr. 8, solicitors for Mr. Kent wrote to say that the breach was 30 yds. wide, and " each tide floods the marshes with further salt water." The clerk in reply said that the breach was 65 ft., and not 30 yds., a correction which, so far as concerns the opening for water, seems immaterial. On Apr. 29, Mr. Kent wrote to say that things were as bad as ever, " in fact, this week there has been more water than ever on the marshes." He adds the comment :

> Fancy men working from eight in the morning till four in the afternoon on such an important job, either when the tide is in or out, and nothing done on Sundays.

The breach was not closed until May 28, and then only by abandoning the futile efforts (thrice repeated with disaster) of rebuilding the wall on its old line, and by making a circular defence out on the saltings. The judge finds—and there is ample evidence to support his finding—that, if the servants of the defendant board had started on this work with reasonable care and skill, they could have closed this breach in 14 days. In fact, owing to the negligent way in which they went about it, they took 178 days to close it.

The judge has held that the defendants are liable to compensate the plaintiffs in damages for having caused or allowed the marshland to be flooded for 178 days, instead of stopping that flooding in 14 days, as by the exercise of reasonable skill and diligence they might have done. The defendants appeal from this decision. If the defendants are so liable, it must be because they owed a duty to the plaintiffs to exercise such skill and diligence. That they failed to exercise them, if the duty existed, there can be no question. Thus, the only question in this appeal is whether or not that duty did arise.

I confess that I think the case law as to the duty and liabilities of a statutory body to members of the public is in a state of lamentable obscurity and confusion. When one considers the diversity of objects with which such bodies have been created, perhaps that is not surprising. Particular utterances of various judges as regards street-lighting, or the running of a railway, may well be difficult of application to so different a matter as the upkeep of the banks of a tidal river. I do not propose to examine these cases, or attempt to reconcile them. I have considered many of them. I believe the rules of law to be as follow. If a body or corporation is by statute empowered to do certain things, but is not ordered to do them, a subject who suffers from their not being done has no cause of action against the body. He cannot say that it owed him any duty to do them. If, on the receipt of Mr. Porter's letter of Dec. 3, the board by their clerk had replied that they would not comply with his request to have the wall repaired, he would have had no ground of claim. He would have had to see his land ruined by the sea, or else get Smith of Blaxhall to repair it at his expense. The second rule, I think, is that, if the body does exercise its power to do certain acts, it owes a duty to any subject who, in his person or property, is affected by those acts to exercise reasonable care, and is liable to him in damages if he suffers by its breach of that duty. In the early days of railways, it was settled that, though a railway was not liable for damage to crops caused by sparks from an engine *simpliciter*, yet, if the sparks resulted from the fact that the engine was not constructed with reasonable care, so as to prevent sparks, it was liable for resulting damage. There seems the more reason to apply such a principle in a case where, as in this case, the act which is authorised is not merely to do something in the vicinity of the subject's land, but actually to enter upon his freehold and do work upon it, whereby he is debarred from doing such work for himself.

The appellants recognise the soundness of this second rule, but seek to apply it only to a limited extent. In the course of the maladroit efforts of Studd and the casual labourers, quantities of bags of earth were thrown into the breach. These the tide took in its stride and spread in dismal confusion over some two or three acres of the pasture. Counsel for the appellants agreed that for this damage to the plaintiffs' land the defendants were liable as for a breach of duty to do their work with reasonable care, but he argued that for the larger damages, resulting from the pasture being flooded for 178 days instead of 14 days, they were not liable. This, he said, was only the result of non-feasance, of an abstention for this length of time from exercising their statutory power to mend the wall. It could not be called misfeasance (to repeat the catchwords of the cases)—that is, the breach of a duty to exercise reasonable care in the exercise of those powers. I cannot accept this contention. If a plumber be summoned to mend a leak in a metal pipe, he need not obey the summons. He is under no duty to do so. If he does undertake the job, however, he must exercise the proper skill of a plumber in his work. If he repeatedly tries to stop the leak with putty instead of solder, and the force of the water repeatedly blows out the putty, and the house continues to be flooded, he will clearly be liable for a breach of duty. The appellants here intimated to Mr. Porter that they were going to exercise their statutory power under the Act of 1930—that is, to come upon his land and do work upon it. If Mr. Porter had known all that which he now knows, it is possible that he would have said that he would rather do it himself, in which case, I suppose, the appellants could have got an injunction to prevent his interfering with their statutory powers. In any case, however, they chose to exercise their power, and undertook to do this work. The essential feature of the work was that it should be done as speedily as possible. If postponed till the flood had killed all the vegetation and ruined the pasture, it might as well not be done at all. When, therefore, the appellants elected to exercise their powers, and do work on the respondents' land, I think that they assumed the duty of doing that work with as much expedition as was consistent with the exercise of reasonable skill, care and diligence. The judge has found that they did not fulfil this duty. There was ample evidence on which he could so find, and I agree with his findings. I therefore think that his judgment awarding damages to the respondents was right, and that this appeal should be dismissed with costs.

du Parcq, L.J.: In this case, the defendants are the East Suffolk Rivers Catchment Board, a body deriving its powers from the Land Drainage Act, 1930. The plaintiff Porter is the owner, and the plaintiff Kent is the tenant, of certain marshlands adjoining the River Deben which are within the defendants' catchment area. On Dec. 1, 1936, the combination of a high tide and a fierce northerly gale caused a breach in the wall protecting this land. The defendants set to work to rebuild the wall. It was not until May 28, 1937, that they finally succeeded in keeping back the water from the marshlands. The judge has found that the defendants went to work in the wrong way, and that success would have been achieved in a much shorter time [p. 225]:

> . . . if the right method had been adopted, with efficient men, and sufficient numbers of men, and adequate materials . . .

The principal question for our decision is whether or not, in these circumstances, the defendants are under any legal liability to the plaintiffs. The further question whether or not the evidence supported the judge's findings of fact was also argued before us, but does not arise if the question of law is answered in favour of the defendants.

In order to deal with the point of law, it is not necessary to state the facts in any detail. The statement of claim alleged (i) that it was the duty of the defendants to repair the wall in question and to keep it in repair, and (ii) that, after the river had broken through the wall:

> . . . the defendants as was their duty . . . commenced to repair the said wall but in breach of their duty to do the same efficiently and with the utmost expedition possible the defendants took no steps so to repair the said wall and failed and neglected to see that sufficient labour was employed or continuously employed or that proper or any supervision was given thereto or that proper or any adequate methods were adopted to mend the breach in the said wall and clear the said marshland of water within a reasonable time or at all in consequence whereof such flooding has continued for many months.

Lengthy particulars were delivered later, which stated the manner in which, according to the plaintiffs, the work should have been done, and included an estimate that the whole work could have been completed in six weeks. The judge rejected the contention that the defendants were under a duty to repair the wall, following and approving the view expressed by STABLE, J., in *Gillett* v. *Kent Rivers Catchment Board* (3), at pp. 813, 814. The plaintiffs did not contend before us that this part of the judge's decision was wrong, and the argument on both sides went on the assumption that it was right. The position of a catchment board under the Land Drainage Act, 1930, was stated thus by STABLE, J., in *Gillett's* case (3), at pp. 813, 814:

> When I say that it [the Act] does not impose a duty on the board at all, I mean that it does not impose on the catchment board a duty in relation to farmers who live inside the area, so as to create a right of action at the suit of those farmers if the duty is not discharged.

If these words are read according to the judge's obvious intention, and for "farmers who live inside the area" one substitutes the words "individual members of the public," I am of opinion that this is a precisely accurate statement. A board which fails to exercise its powers may be directed to exercise them by the Minister (see sect. 12 of the Act), and then, as STABLE, J., pointed out, it does become "the duty" of the Board to comply with the Minister's directions. It is common ground in the present case that the defendants, at least until they began to do the work, were under no duty to the plaintiffs, and in my opinion the language of sect. 34 (which must be read in conjunction with sect. 81, the definition section) makes it plain that the view adopted by HILBERY, J., and by STABLE, J., and not disputed at the bar, was so far correct. It is perhaps as well to add that, for the purposes of this case, sect. 34 (3) of the Act, which gives a statutory right to compensation, may be disregarded as being irrelevant.

There remains the difficult question whether or not the fact that the defendants did exercise their powers, and, as the judge has found, did not exercise them with reasonable skill and diligence, puts them under a liability which they could have avoided by remaining passive. It is said, on the one hand, that, if they are under no duty to the plaintiffs to take any action at all to save the plaintiffs' lands from damage, they cannot have come under a liability to the plaintiffs because they were too slow and not as efficient as they ought to have been in the action which they did take. The plaintiffs, on the other hand, contended that, if the defendants chose to exercise their statutory powers, and exercised them without due skill and care, they were liable for the consequences of their neglect to anybody who suffered by reason of it. In my opinion, the troublesome question which is raised by these contentions is best approached by considering what right, if any, is given to the individual landowner by the statute from which the public body which he sues derives its powers. If the statute confers no right on the landowner, or, in other words, imposes on the public body no duty towards the landowner, it follows that, unless the public body has infringed some common law right of the landowner, no action lies against it at his suit. Thus, a catchment board which, *ex concessis*, is under no statutory duty to landowners within its area, is never liable to one of them either for a total neglect to exercise its statutory powers or (if no more is proved) for exercising them with a lack of efficiency, or with too little zeal or dispatch. On the other hand, in so far as it is possible to exercise the statutory powers without inflicting injury on landowners or other members of the public, there is a common law duty on the board so to exercise them. In this respect, the board is in much the same position as an occupier of land, who may do what he likes with his own, provided that he does not wrongfully injure others. It must, so far as is reasonably possible, exercise its statutory powers in such a manner as not to inflict any injury on others. If it does to a member of the public, through lack of care or skill, some avoidable injury which he would not have suffered if it had remained passive, then it is liable to pay him damages. It is no less liable for a trespass, or any other invasion of a person's common law rights which the statute does not justify. On the other hand, it is not liable for damage suffered through failure to exercise its powers adequately, or at all, even though the damage might have been averted or lessened by the exercise of reasonable care and skill.

I believe this statement of the law to be consistent with, and to be supported by, the authorities. Unfortunately, it is difficult, and perhaps impossible, so to state the principle that the statement, if torn from its context, or not read *secundum subjectam materiam*, will be proof against misunderstanding. The well-known words of LORD BLACKBURN in *Geddis* v. *Bann Reservoir Proprietors* (4), at p. 456, which I need not repeat here, have been quoted before now to support a proposition to which in truth they give no support—namely, that a public body owing no duty to render any service may become liable at the suit of an individual, if once it takes it upon itself to render some service, for failing to render reasonably adequate and efficient service : *Sheppard* v. *Glossop Corpn.* (1), *per* Scrutton, L.J., at pp. 145, 146.

The law would perhaps be more satisfactory, or at any rate seem more satisfactory in some hard cases, if a body which chose to exercise its powers were regarded as being in exactly the same position as one upon which an Act of Parliament imposed a duty. On the other hand, it must be remembered that, when Parliament has left it to a public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, there will be some inconvenience in submitting to the subsequent decision of a jury, or judge of fact, the question whether the authority has acted reasonably, a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift.

If I have stated the law correctly, it follows, in my opinion, that, on any possible view of the facts, the plaintiffs made out no case against the defendant board upon the cause of action pleaded. The judge has found that the board should have employed more and better workmen, and that the attempt to build a dam straight across the breach, instead of erecting a coffer dam, was foolish and foredoomed to failure. All this, however, amounts to "negligence" according to the legal connotation of the word only if the board were under a duty to the plaintiffs to do work intended for their benefit with efficiency and dispatch. In my view, they were under no such duty. Let it be granted that, in a time of great stress, their failure to mass sufficient forces of men and material at one breach out of many in the walls, or to adopt a safer method of damming the waters, is evidence of incompetence or folly. It still cannot be said that any common law right of the plaintiffs' has been invaded. The defendant board were empowered by the Act to do the work, and to enter on the land of the plaintiffs in order to do it (sect. 34 (4)). They have neither done anything which they owed the plaintiffs a duty not to do nor omitted to do anything which they owed them a duty to do. At most, it can be said that they have not exercised their powers so as to give them that speedy protection which they might well expect, but had no legal right to demand.

I may be allowed to add that *Smith* v. *Cawdle Fen, Ely* (*Cambridge*), *Comrs.* (2) is, in my opinion, directly in point here. In that case (where earlier statutes had to be considered), the defendants, like this defendant board, were under no statutory duty to the plaintiffs. I was very ready to listen to any argument directed to persuade this court that the decision in that case was wrong, but it seemed to be conceded that it was right, and it was certainly approved by Stable, J., in *Gillett's* case (3). If it was right, it is, I think, conclusive in the appellants' favour.

It was further contended, however, that, but for the intermeddling of the defendant board, one or other of the plaintiffs would have done the necessary work himself, at his own expense, and done it much better than did the board. This may be true. Nobody, I think, can be certain about it, and the evidence is not, to my mind, conclusive. On the assumption that some cause of action could be based on the allegation that the plaintiffs were induced or compelled to abstain from helping themselves by the futile and misguided attempts of the defendant board to help the community, no such cause of action was pleaded or investigated at the trial, and in my opinion it is too late for the plaintiffs to seek to rely on it now. The measure of damages in such an action would be a matter for careful consideration. Then it was said that the defendants might well be liable on the well-known principle of *Wilkinson* v. *Coverdale* (5). I understand that case to have decided that a person who undertakes to do work for another gratuitously may be liable in damages to that other if he does the work negligently. All that need be said on this point is that it was neither proved nor alleged that the defendants ever undertook any obligation to the plaintiffs. The defendants were acting, not for the plaintiffs, but, it must be assumed, for the common good. They never entered into any sort of contractual relationship with the plaintiffs, whether express or implied.

It remains to deal with one other matter which assumed some importance during the argument before us. It appeared from the evidence that, in doing the work which they undertook, the defendants, by carelessly constructing the dam, (i) caused the deepening of a hole or pool which the scouring of the water had already produced in the plaintiffs' land, and (ii) caused a large number of sandbags to be deposited on the plaintiffs' land. If the statement of claim had alleged that the defendants had done this positive injury to the plaintiffs, it is conceded by the defendants' counsel that they would have had no answer to a claim for damages in respect of it. It would indeed have been difficult to find a better example of that class of case in which, if the view of the law which I have expressed be sound, a catchment board is liable to a landowner. Counsel for the defendants says that, if that claim had been pleaded, they would have paid into court a sum which might have satisfied it. When regard is paid to the small value of this marshland, it does not seem likely that the sum paid in need have been very large when compared with the damages which would be payable if the plaintiffs were entitled to succeed on their case as pleaded. In the circumstances, no application having been made to the judge at the trial to amend the pleadings, this court was unanimously of opinion that we ought not to allow such an amendment now. On the pleadings as they stand, I am satisfied that it is not open to the plaintiffs to use a comparatively trivial part of the evidence relating to the damage suffered in order to convert an action for failure to take proper steps to prevent flooding into an action for the infringement of a common law right. For the reasons which I have stated, I am of opinion that this appeal ought to be allowed and that judgment should be entered for the defendants, but, as the majority of the court have expressed the view that the judgment of the judge should be upheld, the appeal must, of course, be dismissed.

Appeal dismissed with costs.

A

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Cobbold, Sons & Menneer*, Ipswich (for the appellants); *J. R. Welch, Son & Algar*, agents for *Turner, Martin & Symes*, Ipswich (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

Distinguished. YATES (INSPECTOR OF TAXES) *v.* STARKEY. [1950] 2 All E.R. 614.

B

STEVENS *v.* TIRARD.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **November 2, 1939.]**

C

Income Tax—Reliefs—Children's allowance—Sums over £50 *payable to guardian for maintenance of children—Whether children entitled to such sums in their own right—Finance Act,* 1920 (*c.* 18), *s.* 21.

By an order of the Divorce Court, the respondent was ordered to pay to his wife yearly sums of £90, £90, and £70 for the maintenance and education of the 3 children of the marriage respectively. It was contended for the Crown that the children were entitled to those sums in their own right, with the result that the respondent was not entitled to any children's allowance in respect of those children:— D

HELD: the scheme of the order was not to create an income to which the children were in any way entitled, but was to increase the income of the wife so as to enable her to discharge the duty of maintenance laid upon her by the order of the court giving her the custody of the children. The respondent was, therefore, entitled to the children's allowance. E

Decision of LAWRENCE, J. ([1939] 3 All E.R. 154) *affirmed.*

[EDITORIAL NOTE. Relief in respect of children is dependent upon the income of the child in its own right, and the question here is whether money paid to the guardian of an infant to be applied to its education and maintenance is income of the child in its own right. It is decided that the child has no interest in such money, and it is money paid upon a condition as to its application, and not money received by the guardian as a trustee for the child. F

AS TO CHILD ALLOWANCE, see HALSBURY, Hailsham Edn., Vol. 17, p. 304, para. 602; and FOR CASE, see DIGEST, Vol. 28, p. 91, No. 540.]

Case referred to: G

(1) *Re Frame, Edwards* v. *Taylor*, [1939] 2 All E.R. 865; Digest Supp.; 160 L.T. 620.

APPEAL by the Crown from an order of LAWRENCE, J., dated May 26, 1939, and reported [1939] 3 All E.R. 154. The facts are fully set out in the judgment of CLAUSON, L.J. H

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the appellant.

Cyril L. King, K.C., and *Frederick Grant* for the respondent.

The Solicitor-General: The words "in his own right" in the Finance Act, 1920, s. 21 (3), add nothing to the subsection, so far as the facts

of this case go. The wife cannot be required to give an account of how the money is spent, so long as the child is in fact maintained. The order of the court under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 193, created a trust, in favour of the children, of the sums paid by the father for their maintenance. [Counsel referred to *Re*
A *Frame*, *Edwards* v. *Taylor* (1) and RAYDEN AND MORTIMER ON DIVORCE, 3rd Edn., p. 512.]

Counsel for the respondent was not called upon.

SCOTT, L.J.: In this appeal, to speak for myself, I think that the
B argument for the appellant is not consistent with either the language of the order or that of the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 190, 193. Quite shortly, I find myself in agreement with the judgment of LAWRENCE, J., and I adopt it as my own, with the rider that I invite CLAUSON, L.J., to deal with the case from the point
C of view of the procedure of the Chancery side of the High Court, which has been implicitly invoked by the Solicitor-General.

CLAUSON, L.J.: I agree with SCOTT, L.J., that this appeal fails. We have been told by the Solicitor-General that the appeal has been
D brought in order that the law on the subject-matter of it should be clearly settled so far as this court is concerned, and that an arrangement has been made to deal with the costs of the matter below and the costs of the appeal, so that the individual whose actual circumstances have given rise to the question should not suffer. I venture to say that I
E think that it is most desirable that the matter should have been raised and should be settled, and I think it is most satisfactory that the Inland Revenue authorities have taken the course which counsel for the appellant explained to us.

The point is one of very considerable importance, and, I think, of very
F considerable interest. It arises in this way. A husband or wife commences a divorce suit, and, as a result of the suit, the marriage is dissolved. Under the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 190, 193, an order is made by the Divorce Court in an exceedingly familiar form. Such orders are made with very great frequency. Sect. 190
G enables the court to make the husband provide for the wife's maintenance, and sect. 193 gives the court certain powers to make such provision as appears just with respect to the custody, maintenance and education of the children. There were three infant children in this case.

In this particular case, the order of the court is on the following lines.
H First it provides:

> That during the joint lives of the petitioner and respondent until further order [the former husband is to pay the former wife £500 per annum less tax].

The second, third and fourth clauses of the order make provision in respect of the three children respectively. I take the first one as an example. The order is that, during the joint lives of the husband and wife, and until further order, the husband is to pay the wife for the maintenance and education of the child John, until he shall attain the age of 21 years or marry under that age, the sum of £90 per annum, less tax. There was a similar clause as regards Robert and as regards Ann. That order proceeded on the footing, of course, that the custody of the three children had been given to the former wife. I do not find any reference to the mother in this order. That is probably because there is some previous order as to custody, or it may be that no question was raised and the former spouses arranged between them that the wife should have the custody. That does not matter. The point is that the wife had the custody, and this provision is made.

The next thing that happens is that the husband must make his income tax return, and, under his income tax return, he will, of course, in some shape or form, find his liability to taxation diminished by reason of the fact that, under the order, these various sums have to be provided by him out of his income. With that it is not necessary to trouble. The former husband also finds, however, that, under the Finance Act, 1920, s. 21 (1), he is entitled, if he proves that he has living at any time within the year of assessment any child who is under the age of 16 years, to have, in respect of any one such child, a deduction of £50, and, in respect of each subsequent child, a deduction of £40, in calculating the amount of his taxable income. It will be observed that that section says nothing whatever as to whether the child is being maintained at the expense of the claimant for deduction. He has to prove, and he has to prove only, that the child or the children in respect of whom he makes the claim is or are living at the material period. Accordingly, the taxpayer in the present case did make such a claim, and the claim was, in the ordinary course, passed. For reasons which will appear when one looks at the matter from the standpoint of the former wife, the Inland Revenue are now claiming a reconstruction of the assessment on the footing that he ought not to have that deduction. That claim is based upon this. The revenue authorities turn to sect. 21 (3), which provides as follows:

> No deduction shall be allowed under this section in respect of any child who is entitled in his own right to an income exceeding £50 a year.

The Inland Revenue contention is that the effect of the order which I have stated is to provide an income of, in the case of the son John, if I may take him as an example, £90 per annum, which, so they suggest, is an income to which, under the order, he becomes entitled in his own right. If that be the correct position, it follows that the deductions ought not to have been allowed, and the matter must now be readjusted.

I want to emphasise that the sole question which the court below had to decide, and which we have to decide now, is whether the effect of the order of the Divorce Court was to create in the child a title to an income of the sum specified.

Now I want to continue the story and consider the other side of the matter. The money having been paid to the wife in accordance with the order, the position is that one would not expect her to be entitled to claim any deduction from her income under subsect. (1), as the deduction has already been claimed by, and allowed to, the husband. It would seem very anomalous that two persons should be allowed a deduction, the basis of which would appear in equity to be that the deduction is allowed because of the child being a burden upon the financial position of the parents. It will be observed that the deduction has been allowed to the father, although in respect of the burden upon him he has obtained the benefit that the burden has been allowed of itself as a deduction from his taxable income.

If we go on to consider the position of the wife, if the correct view is that the order has made this sum of £90 per annum the income of John, she would be in a position as his guardian to claim on his behalf the return of the tax, on the footing that his income is below the taxable limit. That claim, it will be observed, would have to be made on his behalf. If she recovered—as she would, on the assumption I have made, recover—the tax, what would be the position ? It would be the boy's own income. If the true construction of the order is that the boy's own income has been given to the mother for his maintenance, then, of course, she would be entitled to keep that returned tax towards discharging the maintenance obligation.

Let us consider for a moment, however, what that involves. That involves the proposition that the effect of the order, which admittedly was made under sect. 193, has been to create an income belonging to the infant, and then to give directions as to the manner in which the income of the infant should be dealt with—namely, that it should be paid to the mother for the child's maintenance. To continue as regards the position of the wife, if the contrary view be the correct one, and if these sums which are ordered to be paid to her swell her income so as to enable her to meet the maintenance obligation placed upon her, there is the very anomalous result that it may be that this money, which does not really increase her own resources, since it is money which will have to be spent in substance in maintenance, may have the effect of putting up her income to, let us say, an excess over the sur-tax figure. That is certainly an exceedingly anomalous result. Having regard to the anomalies which hang round the operation of the material section in the case where there has been a divorce and orders have been made on the lines of that legislation with which we are now dealing, it is not astonishing that it has been considered desirable to ascertain with reasonable clearness the exact state of the law on the subject, with a view, no doubt, to putting these various anomalies right, if that be possible.

I return now to what is the point, and, in my view, the only point, in the case, and that is whether the effect of the Divorce Court order has been to create a title in the infant to the income of £90 there referred to. I feel that some apology is due for having gone into the matter at so much length, because, when one gets to the real point, it appears to me that there really can be no doubt whatever about it. As a matter of construction of this order, it appears to me abundantly clear that the scheme of the order is not at all to create an income to which the infant is in any way entitled. The scheme of the order is to increase the income of the mother so as to enable her to discharge the duty of maintenance laid upon her by the court in view of her having the infant's custody. I feel very much fortified in construing the order in that way, because I should have the gravest doubts whether, under sect. 193, there would be any jurisdiction in the court at all to take income away from the father and make it the infant's income, though the court has full jurisdiction to take money from the father and make it available for the benefit of the infant by putting it in the hands of the mother, in whom, under the whole scheme which is completed by this order, are vested the rights of custody and the duty of maintenance of the infant. For these reasons, which I have endeavoured to explain, it appears to me that the judge's judgment was correct.

I should add only one further matter. It was suggested that the decision of Simonds, J., in *Re Frame, Edwards* v. *Taylor* (1) has some bearing upon the matter. That decision, the correctness of which I must not be understood for one moment to impugn, has no bearing at all upon any matter we have to consider in the present case. There the testator by his will gave a legacy to a legatee in the following terms :

> . . . all my money and insurance policies . . . on condition that she adopts my daughter Alma Edwards and also gives to my daughters Jessie Edwards and May Alice Edwards the sum of £5 each and a like sum of £5 to my son Alexander Edwards.

The difficulty arose there because, although the lady in question attempted to obtain an adoption order which would have put on her in substance the liability of maintaining Alma Edwards, she was not able to get such an order, and the question was whether, in those circumstances, there was any trust enforceable by the court in favour of Alma Edwards. Simonds, J., came to the conclusion on the construction of that will that the word " condition " was not used in a strict legal sense, but that the gift must be construed as a gift to the legatee on trust to do certain things—namely, to provide the two sums of £5 each for the two other daughters, and to do something in regard to Alma, the daughter as to whom the legatee failed to obtain an adoption order. On the construction of the words, Simonds, J., held that there was a trust, which the court could enforce, that the legatee should apply the legacy in maintaining Alma Edwards during her infancy. As I say, I do not for a moment suggest that the construction placed by the judge on that particular will was otherwise than correct, but the case appears to me to be of no assistance, simply because, for the reasons I have already stated, not only does it appear to me that, as a matter of construction, no trust is here created for the infant, but also, had I been able to spell such a trust out of the words of the order, I should feel the gravest doubts as to whether the creation of such a trust is envisaged or authorised by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 193. If there were a doubt about that, that would throw a very considerable difficulty in the way of construing the order as creating such a trust.

Accordingly, in my view, the decision of LAWRENCE, J., in this case was perfectly correct. He could come to no other decision. It does remain that there are the most serious anomalies in regard to the questions of income tax in cases such as the one we have had under review, but, of course, that is a matter with which it is not for us to deal, but which must be dealt with by the legislature. I agree, therefore, that the appeal must be dismissed.

GODDARD, L.J. : I am of the same opinion, but I should like to add a few words, especially because I appreciate to the full what a very unsatisfactory position—unsatisfactory from every point of view—arises. The reason why it arises is that, when this question of children's allowances was first introduced into the Finance Acts, this particular situation was not envisaged. When the Divorce Court is dealing with the case of a petitioning wife, and there are children, it does two things, so far as maintenance of the wife is concerned. First of all, whether it acts under sect. 190 (1) or sect. 190 (2), it considers what is a proper sum for the woman to receive from her former husband for her life, quite irrespective of whether or not there are children. It fixes that sum. Then, if the custody of the children is given to the wife, it has to consider that the wife will be put to further expense owing to the fact that she has to maintain, educate and care for the children, and so it gives her another sum, irrespective of what it has already allowed to her for her own maintenance (which will last all her life). It allots to her a further sum (usually, I think, though I am not certain about this, until the children become 21, but not invariably), and, as each child becomes 21, under this order the money which is paid to the mother for the maintenance of that child will cease.

The Solicitor-General will not think that I mean any disrespect to his very courageous argument when I say that it seems to me that this point is unarguable. It is the mother's money, paid to her to enable her to fulfil a duty which the court has put upon her, and, if she does not fulfil that duty, the remedy against her is, not to ask for an account showing how she has spent the money which is given to her, but to remove her from being in the position of custodian of the child, and to give the custody of the child, together with the sum which the court thinks fit to give for its maintenance, to somebody else. I confess I do not see how it can possibly be argued that this money is the money of the child. It is the mother's money. She has the spending of it, and she is accountable to nobody for it. What she is accountable for is how she acts as guardian of the children. The position which results is, as I say, unsatisfactory, it seems to me, from every point of view, and I think that the attention of the legislature might well be called to it. In the first place, the husband can deduct from his income the money that he has to pay, not only to his wife for her own use, but also to his wife for the children, so he gets the advantage that, in finding out the income on which he has to be taxed, this money is deducted as a charge on his income. Then, because, and only because, this point was not thought of when the Finance Act, 1920, was drawn, he is entitled again to claim a deduction for what is called the children's allowance. Thus he gets a double benefit, which seems to me to be quite an excessive award to give to him for his failure to do his duty as a husband, and, to that extent, as a father. The mother can no longer claim, as she has done in this particular case, a personal allowance on behalf of the children, and reclaim tax on the ground that no tax is payable by the children. She will have to treat the money as part of her income, and in certain cases that may work great hardship on her, because, although it will not be so in this case, in certain cases, where larger sums are in question, it may well bring her income up to the sur-tax limit, so that she may have to pay sur-tax as well as income tax. At the same time, she is entitled under sect. 21, having the custody of the children, and they being her children, to claim the children's allowances, and so, from the taxpayer's point of view, it is equally unsatisfactory, because, in respect of the children of divorced parents, in these circumstances the result is that two children's allowances are claimable. Therefore, I say that this is a matter which might well, I think, be brought to the attention of the legislature. The sections being what they are, however, it is useless to ask this court to put the matter right, because as I say, I think the case is really too clear for argument that the money is the mother's money, and not the children's money.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Reynolds, Sons & Gorst* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

FRANCIS DAY AND HUNTER, LTD. *v.* TWENTIETH CENTURY FOX CORPORATION, LTD., AND OTHERS.

[Privy Council (Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Romer and Sir Lyman P. Duff), **July 17, 18, October 12, 1939.**]

Privy Council—Canada—Copyright—Title of song used as title of talkie film—Infringement—Performing right—Literary copyright—Passing off—Copyright Act, 1842 (c. 45)—*Copyright (Musical Compositions) Act,* 1882 (c. 40)—*Copyright Act,* 1911 (c. 46)—*Canadian Copyright Act,* 1921 (*R.S.C.*, 1927, c. 32)—*Canadian Copyright Amendment Act,* 1931 (c. 8), *ss.* 2 (*v*), 3.

The appellant company for purposes of these proceedings were the owners of the copyright in a song entitled *The Man who Broke the Bank* *at Monte Carlo*, but they had not printed on each copy of the song the notice required by the Copyright (Musical Compositions) Act, 1882. In 1935, a motion picture with that title was exhibited in Canada. The plot of the picture did not correspond with the theme of the song. The appellants brought an action against the distributors of the film in Canada and the exhibitors of it in cinematograph theatres in Canada. The appellants claimed damages for infringement of their copyright in the song by performance in public. The action was subsequently extended to include a claim for infringement of the literary copyright, and for passing off. The picture complained of was a talkie film, but no word of the song was used except the title, which was thrown on the screen at the outset. There was no audible reproduction of any part of the musical composition and no copying of the letterpress or musical notation except of the words of the title. It was contended that such use of these words, in actual production and in advertisements, constituted an infringement :—

HELD : (i) though the claim was based upon the Imperial Copyright Act, 1842, the requirements of the Copyright (Musical Compositions) Act, 1882, applied, and, as there had been no publication of the notice required by that Act on each copy of the song, the appellants were not entitled to the protection claimed.

(ii) assuming that the right in respect of literary infringement depended upon the Imperial Copyright Act, 1842, and was not subject to the requirements of any Canadian Act, the copying of the title was in this case so unsubstantial a matter as not to constitute an infringement.

(iii) the Canadian Copyright Act, 1931, s. 2 (v), which added a definition of "work" as including the title thereof when such title is original and distinctive, made no change in the law.

(iv) there had been, on the facts, no passing off.

[**EDITORIAL NOTE.** There can be little doubt that so famous a title as that here in question is a very valuable property from a commercial point of view, but that, of course, does not conclude the question whether its use in a given set of circumstances is an infringement of the rights of the owners of the copyright in the song. The legal question is here considered from every angle and there is not found, in the circumstances of this case, to have been any infringement of a legal right vested in those owners.

AS TO COPYRIGHT IN TITLE OF WORK, see HALSBURY, Hailsham Edn., Vol. 7, p. 525, para. 826 ; and FOR CASES, see DIGEST, Vol. 13, pp. 177, 178, Nos. 131-142.]

Cases referred to :

(1) *Mansell* v. *Star Printing & Publishing Co. of Toronto, Ltd.*, [1937] A.C. 872 ; [1937] 3 All E.R. 912 ; Digest Supp. ; 106 L.J.P.C. 147 ; 157 L.T. 445.

(2) *Dicks* v. *Yates* (1881), 18 Ch.D. 76 ; 13 Digest 178, *133* ; 50 L.J.Ch. 809 ; 44 L.T. 660.

(3) *Licensed Victuallers' Newspaper Co.* v. *Bingham* (1888), 38 Ch.D. 139 ; 37 Digest 546, *80* ; 58 L.J.Ch. 36 ; 59 L.T. 187.

(4) *Weldon* v. *Dicks* (1878), 10 Ch.D. 247 ; 13 Digest 177, *131* ; 48 L.J.Ch. 201 ; 39 L.T. 467.

(5) *Kantel* v. *Grant, Nisbet & Auld, Ltd., Watson & Dominion Battery Co., Ltd.*, [1933] Ex. C.R. 84 ; Digest Supp.

(6) *Routledge* v. *Low* (1868), L.R. 3 H.L. 100 ; 13 Digest 181, *165* ; 37 L.J.Ch. 454 ; 18 L.T. 874 ; *affg. S.C. sub nom.* (1865), 1 Ch. App. 42.

(7) *Graves & Co., Ltd.* v. *Gorrie*, [1903] A.C. 496 ; 13 Digest 163, *15* ; 72 L.J.P.C. 95 ; 89 L.T. 111.

(8) *Canadian Performing Right Society* v. *Famous Players Canadian Corpn.*, [1929] A.C. 456; Digest Supp.; 98 L.J.P.C. 70; 140 L.T. 657.

(9) *Spalding & Brothers* v *Gamage (A. W.), Ltd.* (1915), 84 L.J.Ch. 449; 43 Digest 264, *1018.*

(10) *Samuelson* v. *Producers Distributing Co., Ltd.*, [1932] 1 Ch. 201; Digest Supp.; 101 L.J.Ch. 168; 146 L.T. 37.

APPEAL from a judgment of the Court of Appeal for Ontario (MIDDLETON, MASTEN and HENDERSON, JJ.A.), dated June 13, 1938, allowing an appeal from a judgment of the Supreme Court of Ontario (MCEVOY, J), dated Nov. 23, 1937. The facts of the case are set out in the judgment of their Lordships delivered by LORD WRIGHT.

K. E. Shelley, K.C., and *P. Stuart Bevan* for the appellants.

Arthur J. Thomson, K.C., and *E. J. Macgillivray, K.C.*, for the respondents.

Shelley, K.C., referred to *Mansell* v. *Star Printing & Publishing Co. of Toronto, Ltd.* (1), *Routledge* v. *Low* (6), *Graves & Co., Ltd.* v. *Gorrie* (7), *Canadian Performing Right Society* v. *Famous Players Canadian Corpn.* (8) and to COPINGER'S LAW OF COPYRIGHT, 7th Edn., p. 56.

Stuart Bevan referred to *Spalding & Brothers* v. *Gamage (A. W.), Ltd.* (9) and *Samuelson* v. *Producers Distributing Co., Ltd.* (10).

Counsel for the respondents were not called upon.

LORD WRIGHT: In 1892, a song entitled *The Man Who Broke the Bank at Monte Carlo* was published in London. It consisted of three verses, with a chorus, and was written and composed by Fred Gilbert. Many people remember the original publication. Both words and music were of the most commonplace character, but the music went with a jaunty swing which gave it great vogue and popularity, especially when performed by Charles Coborn. The song, consisting of words and music, was duly registered at Stationers' Hall in London, and acquired copyright under the Copyright Act, 1842. The performing right, however, was not acquired, because of the failure to comply with the conditions imposed by the English Copyright (Musical Compositions) Act, 1882, which required that the proprietor of the copyright, if he desired to acquire and retain the right of public representation or performance, should print upon the title page of every published copy a notice to the effect that the right of public representation or performance was reserved.

In the song, the singer recounts how he went to Monte Carlo to raise his winter's rent, but was so successful at the tables that he had lots of money, went to Paris, and swaggered about as a millionaire. The words of the title are repeated at the end of the chorus.

Gilbert, the writer and composer, died intestate in 1903. Under the then-existing law in England, the copyright would have expired in 1934, but under the Copyright Act, 1911, the period was changed into one of 50 years from the author's death—that is, until 1953. For the residue of this extended period—that is, from 1934 to 1953—the copyright vested, not in the assignees of the right, but in the author or his personal representatives. In the present case, these were two daughters. One of these in 1935 transferred one half of her right to the appellant company, whose title, so far as it goes, is not questioned in these proceedings.

Some time about 1935 there was exhibited in various theatres in Canada a motion picture entitled *The Man Who Broke the Bank at Monte Carlo.* A The plot of that picture was based on a comedy in three acts by Ilia Surgutchoff and F. A. Swann entitled *The Gamble*, but also at different times called *The Man Who Broke the Bank at Monte Carlo*, *Le Jeu*, and other titles. The motion picture represented the plot of the comedy, which consisted of the story of an exiled Russian prince, working as a B taxi-driver in Paris, who went to Monte Carlo to try his luck with money subscribed by his compatriots in Paris. He had a wonderful run of luck. Then followed an elaborate story of his love affair with a woman. He went back to Monte Carlo, was unsuccessful and lost all his money. He suspected that the object of his affection was guilty of double dealing. C He returned to Paris and to his taxi cab. Eventually he and the girl settled their difficulties, and all ended happily.

To an unprejudiced observer, no two things could appear more dissimilar than this song and this elaborate motion picture, except for the bare fact that each bears the title *The Man Who Broke the Bank at Monte* D *Carlo*. The appellants, however, in 1936 brought an action against the two respondents, the former of whom had distributed and rented the film in Canada, while the latter had exhibited it in its cinematograph theatres in Canada. The claim in the action was for damages for infringement of the appellants' copyright in the song by performance in public, but E without any formal amendment the scope of the action became extended, without objection, so as eventually to include also a claim for infringement of the literary copyright and for passing off.

In the Supreme Court of Ontario, McEvoy, J., who tried the action, decided against the appellants in respect of the performing right, but F decided in their favour and awarded damages for the use of the "title and theme" of the musical work. He said nothing on the issue of passing off. In the Appellate Division, the Court of Appeal agreed with McEvoy, J., in rejecting the claim so far as regards the performing right, but reversed his decision in respect of the literary copyright, and held G that there had been no infringement. The court also rejected the claim for passing off. It will be necessary in this appeal to discuss the three heads of claim independently.

The claim for infringement of the appellants' performing right in the song fails, in their Lordships' opinion, on grounds both of law and of H fact. As to the law, the appellants' claim was expressly based on the Imperial Act of 1842, which gave to the owner of copyright under that Act a right to protection in Canada. It was contended on behalf of the respondents, however, that, apart from difficulties arising from the course of Canadian copyright legislation, which need not here be discussed, the appellants, whose claim in the action was based solely on the

Act of 1842, could not in any event claim the protection of that Act, because, as has been stated above, they and their predecessors in title had failed to publish on each copy of the song the printed notice required by the Copyright (Musical Compositions) Act, 1882. It is true that the Act of 1882 did not in terms extend to Canada, but, in their Lordships' judgment, it did so by necessary implication and effect. It was in the nature of an amendment to the Act of 1842, and had the effect of regulating the rights under that Act in respect of public performance. It imposed a new condition for the acquisition and retention of the performing right, whether in England or in any other place where the copyright was based upon, and derivative from, the English right. Thus the Act of 1842 cannot be relied on where performing right is in question according to its original bare terms, but only as qualified by the Act of 1882.

On this narrow ground of law, apart from other considerations, the appellants must fail, in their Lordships' opinion. This agrees with the decision of McEvoy, J., and the Court of Appeal. In truth, however, the appellants' claim fails on the facts. There cannot be an infringement of performing right in a musical composition (assuming it to exist) unless there has been a public performance of the musical composition by the defendant. It is idle to suggest here, however, that by anything the respondents have done they have performed the song in any sense. The motion picture, it is true, is what is called a talkie film, but not a word of the song is repeated in any form, except that the title is thrown on the film at the outset. It will be considered later if that constituted an infringement of the literary copyright in the film. To say, however, that this bare fact constituted a public performance of a musical composition is abhorrent to common sense. A musical composition is performed by audible reproduction, by the voice or by musical instruments or by mechanical methods of reproduction. Nothing of the sort can be predicated here.

The claim for infringement of the literary copyright fails equally, but for other reasons. It is not claimed that there has been any copying of the letterpress or musical notation, except the words *The Man Who Broke the Bank at Monte Carlo*, which constituted the title of the song and appear as the title of the film. What is relied on as infringement is the use of these words as the title of the film. It is clear that they have been used by the respondents as the title of the film, both in the actual production and in the advertisements issued on behalf of the respondents. The respondents, however, say that the use of these words is too insubstantial a matter to constitute an infringement of copyright, and that there is no copyright in a title. They also rely on the recent decision of this Board in *Mansell* v. *Star Printing & Publishing Co. of Toronto, Ltd.* (1). That decision was by itself held fatal to the appellants' claim by the Court of Appeal. That court held that the effect of the decision was that, under the Canadian Copyright Act, 1921, which came into force in 1924, all rights of copyright existing in Canada in virtue of

Imperial legislation might be converted into rights existing by virtue of Dominion legislation, but only by complying with the conditions under the Act of 1906, which was not done either in *Mansell's* case (1) or in the present case. In the words of MIDDLETON, J.A. :

> It was Canadian rights only that were preserved. All inchoate rights existing
> A by virtue of Imperial legislation came to an end.

Counsel for the appellants, however, sought to distinguish the decision in *Mansell's* case (1), and contended that it did not apply in the present case. In *Mansell's* case (1), it was contended, what was in question was copyright in pictures, to which no copyright attached under the Act of 1842.
B It was first granted in England under the Fine Arts Copyright Act, 1862, but that Act did not apply to Canada. There could therefore be no copyright in such works in Canada under that Act. There was no copyright in such works until the passing of the Canadian Copyright Act, 1906, and then subject only to the conditions imposed in that Act, which
C had not been complied with. In the present case, however, as the appellants contended, their only claim to copyright was based on the English Act of 1842, the rights under which did not depend on the performance of conditions under any Canadian Act. That copyright, it was said, subsisted at the date specified as the date of the commence-
D ment of the Act of 1921, and, by the terms of the Canadian Act of 1921, rights under that Act took the place of rights under the English Act of 1842, so that at the material dates these latter rights were vested in the appellants, in the circumstances stated above. In this way, it was said, the appellants did not rely upon, and did not need to rely upon,
E any Dominion copyright legislation, except in so far as the Act of 1921 gave a substituted copyright for the right existing under the Act of 1842.

Their Lordships do not think it necessary in the present appeal to determine this controversy, which raises questions of difficulty and importance on the law, because the appeal can, in their opinion, be
F decided on another ground. Assuming, but not deciding, that the appellant company is entitled to the copyright in Canada which it claims, it is, in their Lordships' judgment, not entitled to succeed in its claim that the respondents have infringed that right. The copying which is complained of is the use of the title, and that is too unsubstantial
G on the facts of this case to constitute an infringement. The appellants' contention was put as high as that copyright in a title is infringed by the application of that title to a work of a different character from that of the work to which it was originally applied. In the present case, the title was originally applied to a musical composition, whereas it has
H been applied by the respondents to a motion picture or a film. The argument of the appellant company would be the same, it seems, if the application of the title complained of had been to a picture or a statue. On this reasoning, it would be said that the title "Adam" applied to a work of statuary would be infringed if that title were used as that of a novel. These and other anomalous consequences justify

the broad principle that in general a title is not by itself a proper subject-matter of copyright. As a rule, a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale, and of so important a character, as to be a proper subject of protection against being copied. As SIR GEORGE JESSEL, A
M.R., said in *Dicks* v. *Yates* (2), at p. 89 (which, as LINDLEY, L.J., said in *Licensed Victuallers' Newspaper Co.* v. *Bingham* (3), virtually overruled on this point *Weldon* v. *Dicks* (4)), there might be copyright in a title "as for instance a whole page of title, or something of that kind requiring invention." This could not be said of the facts in the present case, B
however. There may have been a certain amount, though not a high degree, of originality in thinking of the theme of the song, and even in choosing the title, though it is of the most obvious. To "break the bank" is a hackneyed expression, and Monte Carlo is, or was, the most obvious place at which that achievement or accident might take place. C
The theme of the film is different from that of the song, and their Lordships see no ground in copyright law to justify the appellants' claim to prevent the use by the respondents of these few obvious words, which are too unsubstantial to constitute an infringement, especially when used in so different a connection. D

The appellants' counsel, however, have strenuously contended that, though this might be the position under English or Canadian law before 1931, it was changed in Canada by an amendment in that year of the Canadian Act of 1921, which added a new definition to those contained in sect. 2 of the latter Act—namely, "(v) work shall include the title E
thereof when such title is original and distinctive." It was in virtue of this definition that MCEVOY, J., held that there was infringement, and he awarded damages to the appellant company. The Court of Appeal reversed that holding. MIDDLETON, J.A., did not think it necessary to decide whether the amendment applied to existing copyrights. "It F
is admitted," he said, "that prior to this Act no such right existed." He did not think that, for the purposes of this case, the Act of 1931 had changed the law.

Their Lordships are prepared to assume, for the purposes of this appeal, that the amendment applied to existing copyrights. They will likewise G
assume that the title was original in the sense that it had not been copied from another work. They are content, for the purposes of this appeal, to adopt the definition given by MACLEAN, J., in *Kantel* v. *Grant, Nisbet & Auld, Ltd.* (5), though they wish to reserve the question how far that definition can be accepted as sufficient in other cases. It is, however, H
difficult to define satisfactorily the word "distinctive," since it cannot mean merely that the title is used to identify the particular work. In this connection, regard must be had to sect. 3 of the Act of 1921, which defines copyright as the "right to produce or reproduce the work or any substantial part thereof." The definition (v) does not, in their

Lordships' judgment, mean that the title of a work is to be deemed to be a separate and independent "work." Work is to include "the title thereof." That is to say, the title is to be treated as part of the work, provided that it is original and distinctive, whatever those words may connote. When that definition is read with sect. 3, the result is that
A to copy the title constitutes infringement only when what is copied is a substantial part of the work. This view would agree in effect with what was said by SIR GEORGE JESSEL, M.R., in *Dicks* v. *Yates* (2) in the words quoted above, and would apply to a case such as a title covering a whole page of original matter, or something of that nature, but would not justify
B such a wide extension of copyright as the appellant company has contended for, or the holding of McEVOY, J., on this point. It is said that so to construe the definition is to treat it as adding nothing to the law. The definition may have been inserted to settle doubts and to avoid its being said that in no circumstances could a title receive pro-
C tection. In any event, their Lordships do not think that the new definition (v) entitles the appellants to succeed in this case.

There remains a third point which has been argued on behalf of the appellants—namely, that the respondents have been passing off the exhibition of their motion picture as a performance of the song. This
D startling claim was not pleaded, and is dealt with only by the Court of Appeal, who disposed of it in summary fashion: "Certainly the moving picture was not represented as the copyright song. No one could be misled or defrauded by what was here done." In these words MIDDLETON, J.A., dismissed the claim.

E Their Lordships do not wish to be taken to say that in no circumstances can there be a passing off by the use of the same title for a literary, artistic or musical work, though it is difficult to imagine such a case where there are no circumstances calculated to mislead other than the mere title. A title may, however, be used in the case of a book
F or newspaper under such conditions that persons may be deceived into buying the defendant's book or newspaper under the impression that they are buying that of the plaintiff. Similarity of name may be strengthened by similarity in make up and in subject-matter, and by other circumstances. Nor is such a claim limited to things sold, though
G it is commoner in that class of case. It is not impossible that there might be passing off of such a nature that persons might pay to go to a performance of the defendant's work under the impression that they were going to witness the plaintiff's work. Such cases are perhaps not very likely to occur, but there may conceivably be the same element
H of likelihood of deception, whether designed or not, so as to involve an invasion of the plaintiff's common law rights and a disturbance of his business interests. In their Lordships' opinion, it is enough to state these elementary principles to see how inapplicable they are to the subject-matter of this appeal. The member of the public who is supposed to be likely to be deceived must, to start with, be assumed to know

what he was wanting to see or hear. Thus, in the present case he must be presumed to know that what he wanted was to hear the song *The Man who Broke the Bank at Monte Carlo.* It seems inconceivable that, when or if he bought a ticket for the motion picture, he imagined he was going to hear a performance of the familiar song. The two things are completely different, and incapable of comparison in any reasonable sense. The thing said to be passed off must resemble the thing for which it is passed off. A frying-pan cannot be passed off as a kettle. In Canada, what was advertised was the film. There was no hint that the song was going to be sung. Indeed, it was not sung at any performance. If it had been sung, it would presumably, on the assumptions made by their Lordships, have been an infringement of the performing right, but, if that were possible, it would have made the claim for passing off even more preposterous, because the assumed victim would have got what he desired—namely, a performance of the song.

On all these grounds, their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors : *Syrett & Sons* (for the appellants) ; *Blake & Redden* (for the respondents).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

TOOKE *v.* T. W. BENNETT & CO., LTD.

[KING'S BENCH DIVISION (Lewis, J.), **October 30, 31, November 1, 1939.**]

Money and Moneylending—Memorandum of loan agreement—Loan secured by bill of sale—Copy of bill of sale attached to memorandum—Whether two documents can be read together—Moneylenders Act, 1927 (*c.* 21), *s.* 6.

The plaintiff had entered into a series of loan transactions with the defendants, a firm of registered moneylenders, the security for the loan in each case being a bill of sale over her furniture. The bill of sale contained a certain onerous clause, which was not set out in the memorandum, but the memorandum made reference to the bill of sale, giving its date and value, set out the terms of seizure referred to in the bill of sale, and stated that a copy of the bill of sale was attached to the memorandum. It was contended that, as the bill of sale contained an onerous condition, the bill of sale and memorandum could not be read together to form one document, and that the memorandum did not, therefore, contain all the terms of the contract :—

HELD : the bill of sale and the memorandum were one document, and, as the onerous clause was clearly set out in the bill of sale, it therefore sufficiently appeared in the memorandum.

[EDITORIAL NOTE. The judgment herein considers again the sufficiency of a memorandum of loan where the loan is secured by a bill of sale. It was decided in *Mitchener* v. *Equitable Investment Co., Ltd.* (3) that it was necessary to set out in the memorandum the terms of the power of seizure and sale contained in the bill of sale. This case was considered in *Hoare* v. *Adam Smith* (*London*), *Ltd.*, [1938] 4 All E.R. 283; Digest Supp., and it was held that it was unnecessary to set out those details where the borrower received a copy of the bill of sale. In the present case, it is held that, where the bill of sale is attached to the memorandum, the two become one document. If this is so, it would seem that it would be sufficient merely to refer in the memorandum to the annexed bill of sale, and not specifically to any A of its terms, but in fact the memorandum here did set out in terms the causes of seizure referred to in the bill of sale. The previous cases have left the position a little obscure, but it seems now to be clear that one is safe in referring in the memorandum to the seizure and sale clause in general terms in cases where a copy of the bill of sale is annexed to the memorandum.

As to Sufficiency of Memorandum, see HALSBURY, Hailsham Edn., Vol. 23, B pp. 190, 191, para. 280; and for Cases, see DIGEST, Supp., Money and Moneylending, Nos. 353a-353dd.]

Cases referred to:

(1) *Westropp* v. *Equitable Investment Co., Ltd.*, Unreported.

(2) *Stewart-Naylor* v. *London & Westminster Loan and Discount Co., Ltd.* (1937), C Unreported.

(3) *Mitchener* v. *Equitable Investment Co., Ltd.*, [1938] 2 K.B. 559; [1938] 1 All E.R. 303; Digest Supp.; 107 L.J.K.B. 316; 158 L.T. 176.

(4) *Reading Trust, Ltd.* v. *Spero, Spero* v. *Reading Trust, Ltd.*, [1930] 1 K.B. 492; Digest Supp.; 99 L.J.K.B. 186; 142 L.T. 361.

D Action claiming (i) cancellation and delivery up of a bill of sale over furniture given by the plaintiff as security for a loan and (ii) an injunction to restrain the defendants from taking any steps under the bill of sale for seizure of the furniture on the ground that the memorandum of the loan did not set out all the terms of the contract. The plaintiff, a widow E of some 60 years, had entered into a series of loan transactions with the defendants, a firm of registered moneylenders. The first transaction was a loan of £30, in May, 1929, the plaintiff giving as security a bill of sale over her furniture, which was insured for £100, but was valued, for purposes of a knock-down sale, at £35. This loan, with interest, was F repaid in 1930. In June, 1931, the plaintiff obtained a second loan on the same security as in the prior case, and, after two renewals, this transaction was finally closed on Oct. 18, 1934, by the plaintiff paying the whole of the principal and interest before the due date for repayment, the defendants allowing a discount of some £3. In Aug., 1935, the G plaintiff again approached the defendants, and borrowed another sum of £30 on the same security as in the previous cases. This loan was renewed on four occasions, the last renewal being on May 26, 1938.

R. Castle-Miller for the plaintiff.

F. Hallis for the defendants.

H

Lewis, J.: It is said that all the terms of the contract in this case are not contained in the memorandum. I have not actually seen the memorandum in all the cases, but I have before me the memorandum of contract under the Moneylenders Act, 1927, s. 6, which purports to record the transaction of May 26, 1938, which was the last of the renewals. That memorandum states clearly that there was an advance of £35 :

> . . . being as to £28 15*s*. 4*d*. outstanding under a bill of sale dated Nov. 25, 1937 [the date of the last renewal before May 26, 1938], of which the undersigned was the grantor and the sum of £6 4*s*. 8*d*. now handed the undersigned.

Then there was interest, £14 6*s*., and it is set out quite clearly that the rate is 40 per cent. per annum, being 8*d*. per £ per month on the outstanding balances of principal. It goes on to say :

> Amount payable for strictly regular monthly payments of £2 6*s*. 8*d*. will be £49 6*s*., commencing the 26th proximo. Security : bill of sale dated May 26, 1938 (as per copy attached), value £35, and the events specified as causes of seizure in the Bills of Sale Act (1878) Amendment Act, 1882, s. 7, are as appears on the back hereof. Signed and copy received before advance made. Jessie Tooke.

That is witnessed by Miss Oakley, who was the secretary of the defendant company, and who gave evidence before me. On the back of that memorandum there are set out the five causes of forfeiture, under the Bills of Sale Act, and also the clause which says that Miss Jessie Tooke :

> . . . will during the continuance of the security keep the said chattels and things insured against loss or damage by fire in the sum of £100 at the least in some office to be approved of by the grantees and on failure by the grantor the grantees can insure and demand from the grantor all moneys in respect thereof.

On that piece of paper itself, which is headed " Memorandum of contract," there is set out the clause which insists upon insurance, and also the matters which are referred to in one of the paragraphs of the bill of sale itself, which says :

> Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the grantees for any cause other than those specified in the Bills of Sale Act (1878) Amendment Act, 1882, s. 7.

The moneylenders were careful to set out in quite plain terms what those causes were, and they set them out in the memorandum.

I was referred to *Westropp* v. *Equitable Investment Co., Ltd.* (1), decided by BRANSON, J., *Stewart-Naylor* v. *London & Westminster Loan and Discount Co., Ltd.* (2), which came before me very shortly after the decision of BRANSON, J., and also *Mitchener* v. *Equitable Investment Co., Ltd.* (3), which was decided by LAWRENCE, J., in which reference was made to *Westropp's* case (1) and *Stewart-Naylor's* case (2). As I understand those decisions, one of which was mine, they amount to this. Where a memorandum makes no reference whatever to the causes of seizure which are referred to in the Bills of Sale Act (1878) Amendment Act, 1882, it is true to say that the memorandum does not contain the whole of the terms of the contract.

In my view, those cases are not directly in point here, but what is said in this case is that one cannot have a memorandum in two documents, and great reliance is placed on the *dicta* of SCRUTTON, L.J., in *Reading Trust, Ltd.* v. *Spero* (1), a well-known case dealing with this matter. In that case, SCRUTTON, L.J., appears to have left open the question of whether or not a memorandum can be contained in two documents.

Greer, L.J., however, in the same case, was of the opinion that one could have a memorandum which was contained in two documents. It was argued by counsel for the plaintiff, and argued with considerable force, that it is possible to have a memorandum contained in two documents, unless the bill of sale, which is the second of the two documents, contains an onerous condition. As I understand his argument (and I hope I am doing justice to it), he said: "You may have cases in which a memorandum with a bill of sale attached to it represents the memorandum, but, if the bill of sale contains an onerous condition, then you cannot read the memorandum and the bill of sale together." Personally, I do not accede to that argument. It seems to me that, where there is a memorandum of agreement which not only makes reference to the bill of sale, giving the date and also the value of the bill of sale, but also sets out in terms the causes of seizure referred to in the bill of sale, and also says that a copy of the bill of sale is attached to the memorandum, and, in this case, was in fact attached to the memorandum, it seems to me that the contention that the two documents cannot be read together is not valid. In my view, the memorandum and the bill of sale are one document, and the bill of sale clearly sets out the clause which gives rise to this point—namely, the clause which provides as follows:

> The grantor doth further agree and declare that she will duly pay to the grantees the principal sum aforesaid together with the interest then due by equal monthly payments of £2 6*s.* 8*d.* on June 26 next, and the like sum of £2 6*s.* 8*d.* on the 26th day of each and every succeeding month until the said principal sum together with the interest then due shall be fully paid and that in default of payment of any instalment she will pay interest at the rate aforesaid from the date when such instalment shall so fall into arrear until payment thereof upon such part of the said instalment as if such instalment had been punctually paid would have been applicable in reduction of the said principal sum.

Therefore, it is said, that is a clause making her pay a further 40 per cent. on any default in payment of the instalments. That, undoubtedly, is an onerous clause, but, for the reasons which I have given, the contention that it does not appear in the memorandum, in the circumstances of this case, is not sound.

Judgment for the plaintiff.

Solicitors: *Humphrey Razzall & Co.* (for the plaintiff); *Webster Butcher & Sons* (for the defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

BEACON INSURANCE CO., LTD. *v.* LANGDALE.

[Court of Appeal (Slesser and Luxmoore, L.JJ., and Atkinson, J.), **October 30, 1939.**]

Insurance—Motor insurance—Claim for damages—Absolute conduct and control of proceedings—Settlement without consulting insured—Liability of insured for first £5 of sum paid in settlement.

The appellant was insured with the respondents against third-party risks in respect of a motor cycle. While riding the motor cycle, he collided with the rider of a bicycle, and the bicycle rider claimed damages from the appellant for negligence. The appellant, at the request of the respondents, filled up in his own writing a claim form, setting out the history of the accident. On Mar. 27, the appellant at their request sent to the respondents a copy of a statement made by him to the police. They then settled the claim by payment of a sum of money with denial of liability in pursuance of the authority given to them under the policy, which, after dealing with the prohibition of any admission, offer, promise, payment or indemnity on behalf of the insured without the written consent of the company, stated: "The company . . . shall be entitled, if it so desires, to take over and conduct in the name of the insured the defence or settlement of any claim or to prosecute in the name of the insured for its own benefit, any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the insured shall give all such information and assistance as the company may require." The respondents called upon the appellant to pay the first £5 for which the claim was settled. The appellant contended (i) that the respondents were not entitled to settle the claim without notice to him, and (ii) that they had not acted reasonably in the exercise of their authority:—

Held: the policy gave the respondents power to settle the claim without consulting the appellant, and, where such a settlement included a payment of money, the appellant was liable to pay to the respondents the first £5 of that sum.

Groom v. *Crocker* (1) *distinguished.*

[**EDITORIAL NOTE.** The effect of a clause giving the insurance company complete control over proceedings arising out of a policy has been much discussed by those interested in these matters, but has not often been before the courts. The question in the present case is whether the insurance company, having proceeded to settle a claim, not only without the express sanction of the insured but also against his view of the rights of the matter—and they are entitled to do this under the usual clause giving them the exclusive conduct and control of proceedings—can then claim payment of the first £5 of the sum paid in settlement of the claim under the other usual condition to that effect, and it is held that the exercise of the full powers under the first provision does not in any way affect their rights under the second provision.

As to Conduct of Proceedings by Insurers, see HALSBURY, Hailsham Edn., Vol. 18, pp. 549, 550, paras. 876-878; and for Case, see DIGEST, Supp., Insurance, No. 3217q.]

Case referred to:

(1) *Groom* v. *Crocker*, [1939] 1 K.B. 194; [1938] 2 All E.R. 394; Digest Supp.; 108 L.J.K.B. 296; 158 L.T. 477.

Appeal by the defendant from a judgment of His Honour Judge Dumas, dated June 26, 1939, at the Westminster County Court. The facts are fully set out in the judgment of the Court of Appeal, delivered by SLESSER, L.J.

Hector Hughes, K.C., and *H. H. Harris* for the appellant.

C. N. Shawcross for the respondents.

Hughes, K.C.: The company were not entitled to settle this claim A without notice to the insured, especially as they had notice from him that he denied liability and desired to claim against the third party. Secondly, the company were obliged to act reasonably, and they did not do so. Their settlement prejudiced the character of the appellant as an insured person, and they had no power to settle so as to impose liability B upon him.

Shawcross was not called upon in reply.

SLESSER, L.J.: This appeal fails. In this case, the appellant was insured against what are called third-party risks by a motor cycle public C liability policy with the respondents. The appellant, while riding a motor cycle, came into collision with the rider of a bicycle. This injured person claimed damages from the appellant for negligence. The solicitor for the appellant communicated with the insurance company, and on Mar. 1 the company wrote to the appellant reminding him that it was D essential to report an accident immediately it happened, and asking him to complete a claim form. That form he duly completed, setting out what he asserted to be the history of the accident. He filled it up in his own handwriting, and signed it as policy-holder on Mar. 2, 1939. At the bottom of the claim appear these words:

> E Please read the conditions on your policy relating to claims. Failure to act in accordance therewith may cause inconvenience and delay.

Subsequently, to assist the respondents, on Mar. 27 he sent them, at their request, a copy of a statement which he had made to the police. The respondents then proceeded to negotiate in the matter, as he had given F them full authority to do under the second condition of his policy, which, after dealing with the prohibition of any admission, offer, promise, payment or indemnity on behalf of the insured without the written consent of the company, provided as follows:

> G The company . . . shall be entitled, if it so desires, to take over and conduct in the name of the insured the defence or settlement of any claim or to prosecute in the name of the insured for its own benefit, any claim for indemnity or damages or otherwise. . . .

Then follow these words:

> . . . and shall have full discretion in the conduct of any proceedings or in the H settlement of any claim and the insured shall give all such information and assistance as the company may require.

It appears that the insured had himself complied with that condition, in so far as he had given them all such information and assistance as they might require.

Acting on that authority, under the conditions of the policy they proceeded to settle this claim, and on Apr. 14, 1939, they wrote to the appellant as follows:

> After giving the matter our careful consideration, we have decided that it would be best to make an offer of £45, which offer has been accepted. At this stage we would stress that the injuries received by the third party were severe having particular regard to his age. We would advise you that his out-of-pocket expenses will be quite £45, and we explained to the assessors that we were only making the offer with a strict denial of liability and solely with a view to avoiding litigation. A

That settlement seems to have been completely within their powers. An attempt was made by counsel for the appellant to bring the case within the decision in *Groom* v. *Crocker* (1). In my opinion, the facts of this case are entirely different from those in *Groom* v. *Crocker* (1). In B that case, the solicitors for a certain society delivered a defence on behalf of the respondent admitting negligence, and the respondent, who was in the position of the appellant here, was not notified of the delivery of the defence, and did not learn of it until after judgment had been given against him in his brother's action. In my opinion, this case, so far from C being a case like *Groom* v. *Crocker* (1), appears to have been one in which the insurance company behaved at all times with complete propriety. They drew the attention of the assured, on the claim form itself, to the terms of the contract. They made what they believed to be, in his interest and theirs, an advantageous settlement, and they were at pains to show D that the settlement should be made with a denial of liability, so that thereafter no one could say that they had admitted any culpability whatever on his behalf. As SIR WILFRID GREENE, M.R. says in *Groom* v. *Crocker* (1) (speaking, it is true, of the provision for the conduct of proceedings there set out, rather than of settlement), at p. 203 ([1938] E 2 All E.R., at p. 400):

> The effect of the provisions in question is, I think, to give to the insurers the right to decide upon the proper tactics to pursue in the conduct of the action, provided that they do so in what they *bona fide* consider to be the common interest of themselves and their assured.

Those words seem to be entirely applicable to the present case. F

The next question which arises is the matter which has given grounds for the present action. By a condition annexed to this insurance policy, the appellant agreed with the insurance company that he should:

> . . . be liable to pay the first £5 (or any less amount for which the claim may be settled) of each claim arising under this policy [on or before a certain date], which G expression "claim" shall mean a claim or series of claims arising out of one cause.

The appellant has refused to pay that first £5 "or any less amount for which the claim may be settled," and he has been sued for the £5 by the insurance company in the county court. That suit was decided in favour of the insurance company, and it is from that judgment of £5 that the H appellant appeals. In my opinion, the judge was perfectly right in coming to the conclusion, in the circumstances, that the appellant was liable to pay the £5. Once it is conceded, or found, that the respondents have the power to settle the claim, the event which is contemplated in this provision has arisen. There has been a settlement, and under the terms of the policy he is thereupon liable to pay the first £5 for which the claim has been settled. That seems to me to conclude the matter. There are three ways in which he may become liable to pay the £5. First, if the whole claim or settlement is less than £5, the appellant himself bears it. Secondly, if the case is settled in the appellant's discretion, as provided in the contract, the appellant has to bear the first £5. Thirdly:

> . . . it is further agreed that if the company shall make any payment in full of any such claim the insured will reimburse the company up to the aforementioned sum of £5.

That is not the present case. The present case is one in which the claim has been settled, and competently settled, by the respondents, and thereupon arises the necessary condition of liability on the appellant to pay the first £5. This appeal, therefore, fails, and must be dismissed with costs.

Luxmoore, L.J.: I agree.

Atkinson, J.: I agree.

Appeal dismissed with costs.

Solicitors: *J. S. I. Rabin* (for the appellant); *C. V. Young & Cowper* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

TILLEY *v.* STEVENSON.

[Court of Appeal (Slesser and Luxmoore, L.JJ., and Atkinson, J.), **October 31, November 1, 1939.**]

Negligence—Water—Frost—Damage from burst pipe—Defendant having good reason to believe that water turned off.

The defendant was given the key of a flat on Dec. 14, 1938, but did not actually go into occupation until after Dec. 27, 1938. From Dec. 24 to Dec. 27 water was escaping from a burst pipe in the defendant's flat, causing damage to the flat below. It was proved that the defendant was working in the flat on Dec. 18, but it was also proved that he had good reason for supposing that the water was turned off at the main. The county court judge held that the defendant was negligent in taking no steps to ascertain definitely whether or not the water was laid on:—

Held: it was necessary for the plaintiff to prove that the defendant knew, or ought to have known, that the water was turned on, and, in the circumstances of this case, there was no evidence of negligence on the part of the defendant.

[EDITORIAL NOTE. The liability in case of burst pipes in unoccupied premises has been much discussed, but is not a subject upon which a great deal of assistance from decided cases is available. The Court of Appeal here lay down quite clearly that it is first necessary that the person sought to be made liable must have known, or ought to have known, that the water was laid on to the pipe in question. Upon hearing of the likelihood of severe weather, he is under no liability if he believes the water is not turned on, although some party may have access to the premises.

As to Damage from Burst Water Pipes, see HALSBURY, Hailsham Edn., Vol. 23, pp. 623, 624, para. 873; and for Cases, see DIGEST, Vol. 31, pp. 98, 99, Nos. 2374-2376.]

Cases referred to :

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 ; 36 Digest 187, *311* ; 37 L.J.Ex. 161 ; 19 L.T. 220 ; *affg.* (1866), L.R. 1 Exch. 265 ; *revsg.* (1865), 3 H. & C. 774.

(2) *Rickards* v. *Lothian*, [1913] A.C. 263 ; 36 Digest 194, *353* ; 82 L.J.P.C. 42 ; 108 L.T. 225.

(3) *Miller* v. *Addie (Robert) & Sons' Collieries, Ltd.*, [1934] S.C. 150.

Appeal by the defendant from a judgment of His Honour Judge Hargreaves given in the St. Albans County Court on June 27, 1939, awarding the plaintiff £22 19*s.* damages and costs. The plaintiff was the tenant of a flat into which water escaped from the flat immediately above and did damage. He claimed damages from the defendant on the ground that the latter, being the tenant of the upper flat, left it empty without taking all proper and necessary precautions to prevent the water pipes from bursting, having regard to the low temperatures then prevailing. The facts are stated in the judgment of Slesser, L.J. The defendant admitted in evidence that, at the time the damage occurred, he was paying rent for the flat but was not in occupation. The judge found the defendant liable for the damage because he had taken no steps to ascertain whether or not the water was laid on, but had merely assumed " on very inadequate grounds " that it was not laid on. The defendant appealed.

Robert Fortune for the appellant.

C. Hackforth-Jones for the respondent.

Fortune : There is no duty upon the tenant of a house to anticipate frost and turn water off so as to prevent the bursting of a pipe. Such a duty could hardly be fulfilled, because the conditions of the weather change so frequently that it would place an intolerable burden on the tenant. The judge was wrong in holding that there was any duty on the present defendant to ascertain whether the water was turned on or off. In any event, the principle of the decision in *Rylands* v. *Fletcher* (1) has no application to a case where water (*Rickards* v. *Lothian* (2)) or gas (*Miller* v. *Addie (Robert) & Sons' Collieries, Ltd.* (3)) is brought on to premises for the usual and natural user of such premises.

C. Hackforth-Jones in reply.

Slesser, L.J. : This appeal succeeds. A claim was made by one Mr. Tilley, who was the tenant of a flat, against a Mr. Stevenson, who was, in a sense, in the occupation of the flat above. The complaint was that from Dec. 24, 1938, until Dec. 27, 1938, inclusive, by reason of the negligence of the defendant Stevenson in allowing some water to escape from the flat on the upper floor, injury occurred to the plaintiff's flat.

The facts are these. The owner and builder of the flats was a man named James Joseph Clark, and he gave the defendant Stevenson a key to the flat. He had two other keys, to enable the gas and water companies, and possibly also the electricity authorities, to go on to the premises, but he gave one key to a labourer and the other to a painter.

The flat was being prepared for occupation. Mr. Stevenson intended to marry and to live in the flat. For that purpose he went to see the flat first about Nov. 19. He saw Mr. Clark's agent and told him that he was getting married in the middle of January, and in fact he was given the key of the flat on Dec. 14. He went in on Dec. 18 to have a look round the flat and to stain the floors in order to prepare the matrimonial home. He took with him a kettle full of water, because he thought there would be no water. That means that he thought that the water had not yet been turned on. In that view he was apparently right, because Mr. Clark, the owner of the flat, stated in his evidence that the water was turned off before Mr. Stevenson went to the flat.

The position would therefore appear to be, on the evidence, that the water was turned off before Mr. Stevenson went to the flat, and Mr. Stevenson, whose evidence, I think, the judge accepts on this point—I have no reason to suppose that he does not—says he did not turn it on when he went in on Dec. 18. He did not go back to the flat until Dec. 27, when he heard that the water was leaking. We will assume—the evidence is not very clear—that the leakage was due to a frost which had caused bursting of the pipes. It must have been that somebody else, between the time when Mr. Stevenson left the flat on Dec. 18 and Dec. 27—possibly the painter or the decorator, possibly an employee of the water company, at all events some person who had a key, we do not know who—had turned on the stopcock so that the water was in the pipes. Mr. Stevenson told the judge that he did not turn the stopcock on, and the builder also says that he did not turn it on. The judge in his judgment, as I read it—we have to rely on the report of the local newspaper, but we are none the worse off for that—said that he had decided that liability must rest on the defendant, because it was clear that the defendant took no steps to ascertain whether the water was laid on to his flat. That seems to show that the judge accepted the defendant's statement that he did not turn on the tap.

The only other evidence which is material in this case is that apparently the British Broadcasting Corporation, through their wireless apparatus, gave out some warning on some day unspecified that it was very cold and that pipes might freeze. The morning papers—the evidence does not state whether all of them or which—seem to have made a statement, which persons who are assiduous in reading these matters might or might not have read, to the same effect. We do not know what they said, and there is certainly no evidence that Mr. Stevenson either heard of the matter on the wireless or read the newspapers.

In my opinion, the judge was clearly wrong in coming to the conclusion that Mr. Stevenson was negligent in this matter. This is not a case where the principle of *Rylands* v. *Fletcher* (1) can possibly be applied. If I may quote the language of LORD MOULTON in *Rickards* v. *Lothian* (2), at p. 280:

> It is not every use to which land is put that brings into play that principle. It

> must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

The case, therefore, must be founded in negligence, and for there to be negligence there must be a duty. My Lords have asked counsel for the respondent what the duty was. The judge has stated that the negligence was that Mr. Stevenson took no steps to ascertain whether or not the water was laid on to his flat. He had every reason to suppose that it was not laid on when he left, and there was no water laid on when he took the kettle in on Dec. 18. People are scarcely likely to take kettles into premises where they think that water is already laid on. Moreover, there is no reason to suppose that it was ever turned on before that day, and the owner tells us that it was not. There is a clear probability that it was turned on afterwards.

Therefore, if there is a duty—and it is a very terrifying duty—on a person who wishes to occupy a flat, from the moment he first goes into occupation of a flat, even when he is not actually living there, to remain in the flat in order to see whether or not a workman or anybody else who comes into the flat turns on a stopcock, and if, having done that, he then has to observe the climatic conditions, and, if he thinks, or has reason to believe, either from a study of the newspapers, from the wireless, or from some other source of information, that there is likely to be a frost, he must take precautions to see that the pipes do not burst, and then, if any or all of these things are not done, apparently he is liable to the tenants living below him in lower flats for the resulting damage due to percolation of water. I cannot believe that there is any such duty imposed upon a tenant. It is elementary law that a man cannot be expected to take precautions against dangers which he cannot reasonably be expected to anticipate. I do not think that this man could reasonably have expected that anyone else would turn on this water, and certainly he could not reasonably have expected that, the water having been so turned on, it would freeze, and that, the water having frozen, the pipes would burst. Were this principle to apply, I do not think that any tenant of any flat would be safe from an action at law.

LUXMOORE, L.J.: I agree.

ATKINSON, J.: I agree. It seems to me that the plaintiff cannot succeed without first proving that the defendant knew, or ought to have known, that the water was turned on. All the evidence goes the other way. Mr. Clark says that it was never turned on, and he had very good reason the last time he was there for thinking that it was not turned on. The only inference that can reasonably be drawn is that someone else turned it on. There is no evidence of negligence against the defendant.

Appeal allowed with costs.

Solicitors: *Braund & Hill* (for the appellant); *Peacock & Goddard*, agents for *Asterley Jones & Waters*, St. Albans (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

URBAN HOUSING CO., LTD. *v.* MAYOR, ALDERMEN AND CITIZENS OF CITY OF OXFORD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **October 26, 27, 30, 1939.**]

Public Health—Streets—Private streets—Erection of walls at boundary of estate—Demolition of walls by local authority—Walls built over sewers—Right of owner to opportunity of being heard before demolition—Officer concerned with demolition—Public Health Act, 1875 (*c.* 55), *s.* 26—*Public Health Act,* 1936 (*c.* 49), *s.* 25—*Private Street Works Act,* 1892 (*c.* 57), *s.* 19.

In 1933 the plaintiff company purchased from the defendant council 20½ acres of land for development as a building estate. On the estate plan were marked two proposed new roads connecting with other roads on the adjoining land of the defendants. In 1934 the plaintiff company notified the council that they were going to retain the roads as private roads and soon after they enclosed the whole estate in a ring fence including the building of two walls 7 ft. high and 9 ins. thick across the roads. In 1937 the town clerk of the defendant council wrote to the plaintiff company stating that the walls constituted a breach of the provisions of the Public Health Act, 1875, s. 26 (dealing with buildings over sewers) and stated that he was authorised to take all necessary steps to secure their removal. In 1938 the council adopted the Private Street Works Act, 1892, and later declared the roads to be highways repairable by the inhabitants at large. On June 8, 1938, in accordance with a resolution of the council, the walls were demolished. It was contended that the walls had been erected in breach of covenants contained in the conveyance of 1933, but it was held that, upon the proper construction of those covenants, that was not so. The council further contended that the erection of the walls was in breach of its bye-law providing that one end, and where practicable both ends, of a new street shall be open from the ground upwards to the full width of the road:—

HELD: (i) the erection of the walls was not a breach of the bye-law.

(ii) the principle that a local authority in proceeding to demolish buildings is acting in a *quasi*-judicial capacity and must give the owner an opportunity of being heard on the matter is not confined to cases where the local authority is exercising its powers under a bye-law, but includes the present case. The letter of the town clerk was not sufficient notice as he was not the officer to deal with the actual demolition.

(iii) the Private Street Works Act, 1892, s. 19, does not extend to making the site on which a wall stands a highway repairable by the inhabitants at large, and a local authority cannot, acting under that section, remove the end wall of what is physically a *cul-de-sac*, thereby making it a continuous street with another on the other side of the boundary wall. The walls were rightfully there, and the resolution adopting the Act of 1892 did not make the land on which they stood part of the highway.

Decision of BENNETT, J. ([1939] 3 All E.R. 839) *affirmed.*

[EDITORIAL NOTE. In affirming the decision of BENNETT, J., in the present case, the Court of Appeal has considered one or two matters not so fully touched upon in the court below. The position of the town clerk with reference to a notice of intended demolition is dealt with and it is shown that a notice from that officer is not one which would suggest that the actual demolition is being considered, but rather that the legal position as to the right to demolish is going to be contested in the courts. One would expect the notice of actual demolition to be sent by the city engineer or surveyor.

As to Removal of Buildings improperly erected, see HALSBURY, Hailsham Edn., Vol. 16, pp. 472, 473, para. 687; and for Cases, see DIGEST, Vol. 26, pp. 558, 559, Nos. 2532-2538.]

Cases referred to:

(1) *Hopkins* v. *Smethwick Local Board of Health* (1890), 24 Q.B.D. 712; 26 Digest 564, *2584*; 59 L.J.Q.B. 250; 62 L.T. 783.

(2) *Wood* v. *Cooper*, [1894] 3 Ch. 671; 31 Digest 164, *2975*; 63 L.J.Ch. 845; 71 L.T. 222.

(3) *Stillwell* v. *New Windsor Corpn.*, [1932] 2 Ch. 155; Digest Supp.; 101 L.J.Ch. 342; 147 L.T. 306.

(4) *Tarrant* v. *Woking Urban Council*, [1914] 3 K.B. 796; 26 Digest 555, *2503*; 84 L.J.K.B. 314; 111 L.T. 800.

(5) *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B.N.S. 180; 26 Digest 518, *2202*; 32 L.J.C.P. 185; 8 L.T. 278.

(6) *St. James & St. John, Clerkenwell, Vestry* v. *Feary* (1890), 24 Q.B.D. 703; 38 Digest 231, *610*; 59 L.J.M.C. 82; 62 L.T. 697.

(7) *A.-G.* v. *Hooper*, [1893] 3 Ch. 483; 26 Digest 566, *2597*; 63 L.J.Ch. 18; 69 L.T. 340.

(8) *Paddington Corpn.* v. *A.-G.*, [1906] A.C.1; 33 Digest 50, *303*; 75 L.J.Ch. 4; 93 L.T. 673; *revsg.* S.C. *sub nom. Boyce* v. *Paddington Borough Council*, [1903] 2 Ch. 556.

(9) *Slaughter* v. *Sunderland Corpn.* (1891), 60 L.J.M.C. 91; 38 Digest 184, *235*; 65 L.T. 250.

Appeal by the defendants from an order of Bennett, J., dated July 25, 1939, and reported [1939] 3 All E.R. 839, where the facts are fully set out.

C. E. Harman, K.C., and *Wilfrid M. Hunt* for the appellants.

C. Erskine Simes and *C. E. Scholefield* for the respondents.

Harman, K.C.: The walls were built over sewers, and the Public Health Act, 1875, s. 26, gave the local authority control over sewers. In 1938, the appellant council adopted the Private Street Works Act, 1892. The walls were not fences, and to build a wall was contrary to a covenant in the conveyance, which provided that no building, other than a fence, gate or other enclosure, should be erected on the roads. That exception cannot cover the walls in question, as such exception would not fit the context. In *Wood* v. *Cooper* (2), it was held that a trelliswork screen was a building within the meaning of a covenant not to erect any building other than a stable and a coach-house. In the present case, it would be an abuse of language to say that these walls were not buildings or structures. They were substantial and permanent erections, and were built in breach of the covenant. The local authority had a right to remove the walls after the soil of the roads had vested in the authority, under the provisions of the Private Street Works Act, 1892, s. 19. In *Stillwell* v. *New Windsor Corpn.* (3), it was held that the corporation had a right to remove trees which had become a nuisance on the highway, even assuming that the plaintiff had a property in the trees. It was said by Bennett, J., that, if the wall were a fence within the meaning of covenant 7 of the conveyance, it could not be a building within the meaning of covenant 9. It can be a fence, however, within the meaning of one covenant and a building within the meaning of another. [Counsel referred to *Tarrant* v. *Woking Urban Council* (4), *Cooper* v. *Wandsworth Board of Works* (5), *Hopkins* v. *Smethwick Local Board of Health* (1), *St. James & St. John, Clerkenwell, Vestry* v. *Feary* (6) and *A.-G.* v. *Hooper* (7), and to LUMLEY'S PUBLIC HEALTH, 10th Edn., Vol. 1, p. 921.]

Simes: The respondent company asks for a declaration that it is entitled to erect a wall of a character similar to the wall which has been pulled down. As to whether or not the wall is a building within the meaning of the Public Health Act, 1875, s. 26, one must have regard to the purpose of that section. This particular wall was not a building to which the section applied. As regards the covenants, one has to consider the word "building" in regard to the purpose of the covenant. Covenant 9 cannot prohibit anything which is permitted by covenant 7. On the true construction of the document as a whole, the wall is not a building within the meaning of cl. 8. Assuming, however, that it is, the council was not entitled to pull down the wall. One cannot adopt self-help as a means of remedying a breach of covenant. The council is an adjacent landowner, and sold to the respondent its piece of land. The council is entitled to disapprove the plans only upon the ground that the wall was not properly constructed. Assuming that the wall was a building under the Public Health Act, 1875, s. 26, the part of that section which deals with a building is repealed, as from Oct. 1, 1937, by the Public Health Act, 1936, s. 25, which replaces it. If the council had waited 11 days before sending the notice dated Sept. 20, 1937, the respondent company would have been thrown back on sect. 25 (3), and have had to deal with the matter before justices under sect. 290. It has not been suggested by the council that the notice given in Sept., 1937, was a notice which became a notice under sect. 25 (3) of the 1936 Act. [Counsel referred to *Paddington Corpn.* v. *A.-G.* (8) and *Slaughter* v. *Sunderland Corpn.* (9).]

SIR WILFRID GREENE, M.R.: This is an appeal by the mayor, aldermen and citizens of the city of Oxford against an order made by BENNETT, J., declaring that the respondents, the Urban Housing Co., Ltd., were entitled to re-erect and maintain two walls which had been demolished by the appellants. I do not propose to go into the details of the history of this unfortunate controversy. They are fully stated in the judgment of the judge. I need only say, by way of preface to my judgment, that, when on Sept. 19, 1933, the appellants, whom I will call the corporation, conveyed to the respondents, whom I will call the company, part of the corporation's building estate, they omitted, whether by accident or by design, to reserve to themselves rights of way over certain roads, the sites of which were indicated on the relevant plans. Their omission to do so has led them to perform a variety of manœuvres in seeking some possible expedient which would enable them to obtain, against the will of the company, the rights for which they had failed to stipulate. The last expedient which commended itself to the corporation consisted of a judicious combination of the provisions of the Private Street Works Act, 1892, and the city's steam roller. To what extent this miserable performance can be reconciled with the dignity of a great and historic corporation is a question which may well be left to the more sober reflections of the city fathers. We are not concerned with it.

A variety of points were quite properly taken by counsel for the appellants, in order to persuade us to say that the judgment of Bennett, J., was wrong. I will deal with those points in what appears to be the most convenient order. The first points relate, and relate only, to the true construction of the conveyance, and there are two of them. The first is based upon the provisions of the conveyance with regard to roads. The other is based on the provisions of the conveyance with regard to buildings. By way of preface, I should say that it is admitted—and, indeed, it could not have been otherwise—that the conveyance upon its true construction does not reserve to the corporation any right of way in respect of the roads in question. The object of the arguments based upon the construction of the conveyance is not to obtain what they would be quite insufficient to obtain—namely, a right of way—but to ensure that no obstruction in the shape of a fence or wall, or anything of that kind, should be placed at the company's boundary across these two roads. In other words, it is said that, upon its true construction, the conveyance prohibits the company from doing what, in the normal course, a landowner in the company's position might very well wish to do—namely, fence his own land. It is to prevent the company from exercising such a common right that these arguments are brought forward. Be it observed that the arguments, if successful, would lead to the position that the company's boundaries, where they coincide with the sites of the roads, would perforce be left open, but nobody would be allowed to set foot upon the company's land. Neither the corporation nor its tenants would have a right of way, and, if anyone set foot across the imaginary dividing line, he would be a trespasser. Nevertheless, for reasons which will appear, the corporation consider that, if they can keep these roads open, unobstructed at the ends, it will put them in a position to exercise some statutory right, as the indirect result of which the right of way for which they omitted to stipulate, and in the absence of which the purchase price of the land was fixed, could be obtained.

I now turn shortly to the clauses in the schedule upon which reliance is placed. It will be remembered by those who have considered the statement of facts and the judgment of Bennett, J., that the plan annexed to the conveyance—the estate plan which was agreed in accordance with the conveyance (it was in fact agreed beforehand)—and the sewer plan all show continuous roads, starting at the Banbury Road on the west, running over a portion of land belonging to the corporation and retained by them, over which the company was given a right of way, thence up to the boundary of the land purchased by the company, and from that point continuing into the Cutteslowe Housing Estate, which was in process of development by the corporation. It will also be remembered that in the conveyance the corporation reserved to themselves a right which would enable them to move from the position A indicated the portions of the continuing roads shown on the Cutteslowe Estate, so that there would be thereafter no continuation in fact, and, if the corporation were minded to exercise that power, the result would be that the roads shown on the plan as running up to and through the company's boundary would end in *culs-de-sac* at the eastern boundary B of the company's land.

The clauses relied upon in relation to roads are cll. 4, 12, 16 and 18 of the schedule, and it is said that those clauses, when considered and read in relation to the relevant plans, show that the parties were bargaining on the footing that the roads were through roads. I am not quite sure C what that phrase means. If it means that they were to be roads over which there should be mutual or unilateral rights of way, it is incorrect, because there is nothing in the conveyance which gives any such rights. I apprehend, therefore, that all it means is that these clauses, on their true construction, show that the obligations of the company were to D leave what would physically be a road running up to their boundary, and having there a junction with a road running through the corporation's land. In other words, when the roads are spoken of as through roads, that refers merely to their physical layout on the ground. That they were not intending that that would necessarily be the result, however, E is manifest from the fact to which I have already alluded—namely, that the corporation have power so to lay out their estate that that state of affairs will not exist.

Under cl. 4, the company covenants to lay out and sewer all the roads to be constructed within the area of the land conveyed, and then it F specifies widths :

> The two continuation streets of the width of 40 ft. in respect of the continuation of the said two streets coloured yellow on the said plan. . . .

All this was to be done in a manner and to the satisfaction in all respects of the vendors as the local authority, and in accordance with the building G bye-laws as to new streets and the provisions of public and local Acts, and the purchasers were to pay the costs. Emphasis is there laid upon the word " continuation " in the phrase " the two continuation streets," but it is clear to my mind that the word " continuation " there is used in reference to the fact that the two streets going across the company's H land, which it was purchasing, were continuations, not of some roads upon the corporation's housing estate on the east, but of the yellow roads shown on the plan, which were the roads over which, as I have said, the company were given the right of way at the Banbury Road end. However that may be, and giving such effect as can properly be given to the circumstance that, when the plans are examined, they show that the roads physically are continuing and joining the roads on the corporation's estate to the east, I am quite unable to extract from this clause anything which imposes upon the purchasers the obligation of keeping that part of their estate open or prohibits them from fencing in their estate, if they are so minded. The real fact of the matter is that in this clause, and in the other clauses of this conveyance, no proper provision was made for that point. If the corporation had wished to prevent the purchasers from fencing their estate, and had wished, without reserving a right of way, to compel the purchasers to leave those points unfenced, they should have provided for that, but they did not, and now, not unnaturally, they seek to extract from the language of the deed phrases which will enable them to get something for which they did not expressly provide, and the necessity for which they apparently did not contemplate at the time.

There is one point on that clause which I have read which requires a word of special reference, and that is the provision that the construction of the roads and the other works mentioned is to be in accordance with the building bye-laws as to new streets. It is said that under that clause—or, indeed, without it—there is a bye-law under which the company was bound to leave the ends of those two roads open and unobstructed. The bye-law in question is No. 10, which provides as follows :

> Every person who shall lay out a new street shall provide that one end at least of such street, and where practicable both ends, shall be open from the ground upwards to the full width of such street.

If that bye-law were one which purported to deny to a landowner, who was minded to lay out a street on his land, the right to maintain a fence at his boundary and so leave the new street in the position of a *cul-de-sac*, I should be disposed to think, and very strongly disposed to think, that the bye-law was completely *ultra vires*, but, in my opinion, as a matter of construction of the bye-law, it does not purport to impose any such restriction upon the rights of a landowner. The words " where practicable both ends " can, I think, be construed in such a way as not to involve an interference with such a right, with the result that it could not be said, in a case where the owner of the land wished to maintain a fence in accordance with his ordinary rights, that it was practicable to leave that street open at both ends. That is the case here, and I cannot find in this bye-law, either as imported in to cl. 4 of the schedule or as standing quite apart from the conveyance, anything which enables the corporation to complain of the erection of these two walls.

Clause 12 provides as follows :

> No portion of the land shall be used as a road or way or as part of a road or way from or to any land adjoining or adjacent to the said land other than the roads shown on the said plan without the consent in writing of the vendors first obtained.

That, in my judgment, carries the matter no further, and cannot be construed, either alone or in combination with other clauses in the schedule or the plans, as depriving the purchasers of the right to do what they did. Then cl. 16 is the clause to which I have referred under which the corporation were entitled to alter the plotting of any land unsold and to vary the position of any intended roads leading from the roads to be constructed on the land which the company was acquiring. That, again, so far from helping the corporation, appears to me to point in the opposite direction, because, in so far as the corporation exercised that right, the alleged scheme of through roads, if it ever existed, would cease to exist and could not thereafter be carried out. Clause 18 uses the phrase "the scheme of roads," and perhaps I should read that clause, which provides as follows :

> The scheme of roads building lines and other matters as shown on the said estate plan and the building and other restrictions imposed upon purchasers shall not be binding upon the vendors who shall be at liberty to vary or alter the same from time to time as regards any other portions of the vendors' adjoining land without reference to the owners or occupiers of any plot or plots which may have been previously sold or otherwise disposed of.

That, again, gives a like power to the corporation with regard to altering the sites of intended roads on their retained land as shown on the plans. Emphasis was laid on the phrase "the scheme of roads," but, in my judgment, that phrase does not really assist the argument at all. The real fact of the matter is, as I have said, that the conveyance did not provide for an obvious thing for which it could have provided, and it is impossible to spell out of these phrases some restriction upon the ordinary rights of a purchaser in the way suggested.

The other argument was based on the clauses relating to "building," and those relied upon were cll. 5, 7, 8 and 9. Clause 5 provides as follows :

> The purchasers shall only erect on the land hereby conveyed detached or semi-detached houses and two blocks of eight garages each for the use only of owners or occupiers of houses erected on the said land in accordance with the estate plan.

Clause 6, I should have mentioned, provides as follows :

> No house or other building shall be erected so that its principal front shall face otherwise than towards the said roads.

Clause 7 provides as follows :

> The front or flank walls of any house or building to be erected on any part of the land hereby conveyed shall range or be in line with the building line or lines. . . .

Then comes this provision, which I must read at length :

> . . . no building or erection of any kind except a fence or other enclosure and a gate or gates shall be erected on any part of the said piece or plot of land which lies between the said building lines and the road or on the sites of the proposed roads marked on the said estate plan.

Pausing there for a moment, that sentence which I have read bears, on the face of it, the traces of a rather curious origin, because the first part, which refers to "the said piece or plot of land," and provides that the only thing which can be erected beyond the building line is a fence or other enclosure and a gate or gates, recalls a common type of provision in conveyances of a plot out of a building estate, in respect of which the building line is to be observed, but the power to fence the front garden of the house is reserved. Whether or not that be the origin of this clause, on to it there are grafted words relating to the sites of the proposed roads. It would be tempting, perhaps, if one were trying to look very carefully for something to help the corporation in view of what they have done, to do violence to this clause and say that the exception for the construction of a fence or other enclosure is confined to what I may call the front gardens of the proposed houses, and does not extend to the sites of the proposed roads, but I find myself quite unable to do such violence to the language of this sentence. It means, grammatically, as far as I can see, and means quite clearly, that the exception with regard to the construction of a fence or other enclosure and a gate or gates applies, not merely to the front gardens of the proposed houses, but also to the sites of the proposed roads. That being so, the clause in terms permits the erection of a fence or other enclosure on the sites of the proposed roads, and one can really see no reason why that should not be so. Of course, if the corporation had reserved a right of way, it would be impossible to construe it in that way, and some other construction would have to be found, but, no rights of way having been reserved, I cannot see any reason why the company should not have been given—in rather clumsy language, it is true—the power to build fences or obstructions across the roads if they wished. Now it is said that the phrase "fence or other enclosure" would not include a wall. I am quite unable to take that view, and I need say no more about that. Therefore, we reach the point that a wall, and this wall, was a thing permitted to be put up under cl. 7. Clause 8 provides as follows:

> The erection shall not be commenced of any house or other buildings on any part of the land hereby conveyed until and then only in accordance with an estate plan showing the proposed lay out and also plans and drawings of such house or other building showing the intended elevations and sections and specifications thereof have been submitted to and approved by the vendors or their surveyor for the time being the purchasers submitting the said estate plan and plans elevations sections and specifications as often as called upon by the vendors' estates surveyor so to do until the same shall be finally approved and signed by the vendors' estates surveyor and if required leaving with him for reference copies of such approved estate plan plans elevations sections and specifications and a copy of such drawings has been deposited by the purchasers with the vendors in respect of each house or building.

Clause 9 provides as follows:

> No building shall be erected on the said piece of land or on any plot forming part thereof other than a private dwelling-house with suitable offices and outbuildings and with or without garage accommodation and the said sixteen garages.

The first point is whether or not this wall is a building within the meaning of the clauses which I have read. In my opinion, it is not a building within the meaning of those clauses at all. When those clauses are examined and the word "building" is looked at in its context, it appears to me to relate to matters in respect of which one would expect to find a requirement for the submission and approval of plans, a thing for which, in the case of a boundary fence or boundary wall, one would not expect to find a provision. I am confirmed in that view by the circumstance that, in the clause in which reference is made to a fence or other enclosure, the phrase is " no building or erection." Accordingly, the parties here are using the phrase " an erection " as meaning something which is not necessarily a building, and into that category they appear to place such things as fences or other enclosures, which indeed strikes one as being in accordance with common sense. I therefore take the view that there was no obligation to submit plans, and that is really the point of the argument, once it is held that this is a fence or other enclosure. The point of the argument is that, before these walls were erected, plans should have been submitted under cl. 8. Then it is said that, no plans having been submitted, the walls were built in breach of covenant, that they were wrongfully there, and that therefore their presence must be disregarded, and they could be removed by means of the city's steam-roller. It is perhaps desirable to state for the information of the appellants that the removal by force of something erected in breach of a covenant is not a thing which the law of England permits. This is not the case of the abatement of a nuisance, and, even if the argument were right, the only effect would be that the walls had been erected in breach of covenant. The idea that persons, whether local authorities or others, are entitled to secure the benefits of covenants into which they have entered by taking forceful means is one which need not be further commented upon by me. My own opinion is, as I have said, that these are not buildings, but, even if they were, the conduct of the appellants in waiting for three years or more after the erection of these walls, without suggesting at any time, either by correspondence or in their defence, that the vice of them lay in the failure to submit plans, makes it impossible for them now to turn round and say, " We are entitled to call for the removal of these walls upon the ground that plans were not submitted or approved." In my opinion, they could not, in any event, be permitted to take up that attitude at this stage, and on that ground, as well as on the interpretation of the word " building," I am of opinion that this branch of the argument has no solid foundation.

I now come to the other matters which were urged upon us. First of all, it was said that these walls were things which had been erected in contravention of the Public Health Act, 1875, s. 26, which was in force when they were erected. That section provided as follows :

> Any person who in any urban district, without the written consent of the urban authority—(1.) causes any building to be newly erected over any sewer of the urban authority; or, (2.) causes any vault arch or cellar to be newly built or constructed under the carriageway of any street, shall forfeit to the urban authority the sum of £5 and a further sum of 40*s*. for every day during which the offence is continued after written notice in this behalf from the urban authority; and the urban authority may cause any building vault arch or cellar erected or constructed in contravention of this section to be altered pulled down or otherwise dealt with as they may think fit [and then they may recover expenses].

The history of the appearance of that section on the scene is to be found in the correspondence and certain minutes, and it is desirable that I should refer to them. On Sept. 20, 1937, the town clerk wrote to the company asserting that the acts of the company in erecting the two walls constituted, first, a breach of the covenants in the conveyance, and, secondly, a breach of the bye-laws—namely, bye-law 10, which is the one to which I referred. Thirdly, he said :

> The council are further advised that your acts constitute a breach of the provisions of the Public Health Act, 1875, s. 26. Under these circumstances the council have instructed me to call upon you to remove the buildings you have erected and to make good the surface of the roads upon which the same were erected within 21 days from the date hereof, failing which the council have authorised me to take all necessary steps to secure their removal and such reinstatement at the earliest possible moment.

Then a notice was enclosed pursuant to the provisions of sect. 26. The notice was the notice which sect. 26 contemplates, which is to cause the running of the fine, and that was the only matter to which it related. It was said that the letter, from which I have read the relevant passage, was something more—namely, a notice by the corporation of their intention to exercise the power given by sect. 26 to remove the walls. In my opinion, the letter is nothing of the kind. It is to be observed that the writer of the letter is the town clerk, and he informs the recipient that the council had authorised him to take all necessary steps to secure their removal—that is, the removal of the walls. I apprehend that, even in the corporation of the city of Oxford, the task of physically removing obstructions of this kind is not committed to the town clerk. The proper person to pull down buildings, if buildings have to be pulled down, is the city engineer, or somebody of that character, and nobody receiving an intimation from the town clerk stating that he, the town clerk, had been authorised to take the necessary steps would for one moment imagine that that referred to anything more than the sort of steps which town clerks are commonly authorised to take, including, of course, the institution of legal proceedings. Therefore, I find it quite impossible to construe this letter as bringing to the mind of the recipient any idea that the corporation were intending to exercise their powers under sect. 26 without more ado. I am confirmed in that construction of the letter when I find that the resolution pursuant to which it was sent—namely, a resolution adopted by the council from the parliamentary committee on Sept. 20, 1937—provides that the company be called upon to remove the walls, which are there described as " buildings," and " in default of compliance . . . the town clerk be authorised to commence and prosecute . . . proceedings," which are there specified, and, after stating the matters which the council desire to have submitted to the decision of the courts, it ended up by saying " that the town clerk be further authorised to take such steps under such respective sections as he may be advised." It is perfectly clear from that that at that time the council were not contemplating pulling down the walls without having recourse to the courts and having their rights in this dispute

settled in a proper way. The importance of what I have been saying is its bearing upon the argument that, under sect. 26, what the corporation have done was justifiable, and in support of that argument reference was made, and necessarily made, to a matter which would destroy its force—namely, the principle that a local authority exercising such a power of
A demolition as this, in coming to its decision to demolish, and thereby conferring upon itself the statutory power to demolish, is acting in a quasi-judicial capacity, and must give the person concerned either a notice that it intends to take this matter into its consideration with a view to coming to a decision, or, if it has come to a decision, that it
B proposes to act upon it, and give him an opportunity of showing cause why such steps should not be taken. That is a matter which has often come before the courts. I need not do more than refer to one case in which the principle is examined and stated—namely, *Hopkins* v. *Smethwick Local Board of Health* (1). An attempt was made by counsel
C for the appellants to limit the application of that most salutary principle to cases where the building which it is sought to demolish has been erected in contravention merely of a bye-law. I am unable to place any such limitation upon that doctrine. It is to be observed that the power to demolish, in this case as in the other cases which are relevant upon
D this matter, is a power contained in the statute itself. It was said that, assuming that this principle applied to the present case, a sufficient notice to satisfy it had been given, and that that notice was contained in the letter from the town clerk, to which I have alluded. I have explained why, in my opinion, the letter of the town clerk would not have
E operated as a sufficient notice to satisfy the principle of those authorities, and accordingly that point, in my opinion, is a bad one.

The Public Health Act, 1875, s. 26, was repealed by the Public Health Act, 1936, so far as it deals with a building, and certain other provisions take its place. I shall have to say a word about those provisions when
F I come to mention the proper form of order of this court. For the moment, all I need say with regard to sect. 26 is that, if it had been material for the purpose of settling the form of order, or otherwise for the purposes of this case, to decide whether or not these particular walls were buildings within the meaning of the Public Health Act, 1875, s. 26,
G I should have been disposed to take the view that they were, seeing that, although it is not suggested that the weight of these walls can injure the sewers, nevertheless there must be, on the face of it, some slight interference, or might be some slight interference, owing to their presence, with the facility of repairing or re-laying the sewers. However, as
H will appear, I do not think that, in view of what has happened, the order made by BENNETT, J., requires any modification at all. That disposes, I think, of the arguments based on the Public Health Act, 1875, s. 26. There is another answer, however, which appears to me equally conclusive. The reliance placed upon the Public Health Act, 1875, s. 26, is, in my judgment, quite misplaced for what is perhaps a more

fundamental reason, which goes to the root of the whole argument, and that is that the pulling down of these walls was quite clearly not carried out in exercise, or in purported exercise, of the powers conferred by sect. 26 at all. It is perfectly obvious that the reason why these walls were pulled down when they were pulled down had nothing to do with sect. 26. In deciding to pull them down at the time when they did pull them down, the corporation or their committee did not take into consideration the provisions of sect. 26 at all. They pulled down these walls in order to secure that that portion of the company's boundary should remain open and unfenced, and they did not pull down the walls in exercise of the statutory power conferred by sect. 26. One need only glance at three of the minutes in order to see that that is incontestably so. The parliamentary committee on May 9, 1938, resolved :

> . . . to ask the council at the ordinary meeting of the council to be held on June 20 next to ratify any action taken by or instructions given by the committee at its meeting on June 7 next, and that meanwhile any risk involved be accepted.

It is to be noted that here is the parliamentary committee, having no authority to take action themselves, meeting on May 9, contemplating that at their own meeting on June 7 they will be coming to some decision, or will be giving some instructions, which will involve some risk, and proposing at the council meeting on June 20 to have that decision of theirs and that action of theirs ratified by the council after it had taken place. On June 7, the parliamentary committee met again, and they passed a resolution that :

> . . . the city engineer [not the town clerk, be it observed] be and is hereby instructed to remove forthwith the walls.

It was proposed that the chief constable should provide police assistance in this precious affair, but that was not thought necessary, and accordingly it was not made part of the resolution. It was further resolved :

> . . . that the council be recommended to ratify the above instructions and action taken by the committee and to indemnify the members of the committee and the officers and workmen of the corporation against all actions, proceedings, claims, damages, costs and expenses arising out of the removal of the walls.

On June 8, the walls were removed. They were removed under the resolutions of a committee which had no authority to take any such action, and in the expectation that 13 days later, at its meeting, the council would ratify what they had done. To suggest that this performance was in execution of the powers conferred by the Public Health Act, 1875, s. 26, is, to my mind, farcical, and that by itself is sufficient to get rid of any points based on that section.

The last point taken is one depending on the Private Street Works Act, 1892. Sect. 19 of that Act provides as follows :

> Whenever all or any of the private street works in this Act mentioned have been executed in a street or part of a street, and the urban authority are of opinion that such street or part of a street ought to become a highway repairable by the

> inhabitants at large, they may by notice to be fixed up in such street or part of a street declare the whole of such street or part of a street to be a highway repairable by the inhabitants at large, and thereupon such street or part of a street as defined in the notice shall become a highway repairable by the inhabitants at large.

The two streets in question upon the company's land were streets upon which private street works within the meaning of the Act had been executed, and it was within the power of the corporation, who had adopted the Act, to put sect. 19 into operation with regard to the streets in question. It is to be observed, however, that, at the date when they passed the necessary resolution to put sect. 19 into effect, there were in existence upon these two streets the physical obstructions of the walls, and, accordingly, the physical condition of affairs at that date was that the powers under sect. 19 could be applicable to such portion only of the company's roads as were not covered by walls. That is, to my mind, incontestable. Sect. 19 empowers local authorities to make streets repairable by the inhabitants at large. It does not extend to making the site on which a wall stands a highway repairable by the inhabitants at large, and the local authority cannot by this section take what is physically a *cul-de-sac* and remove the boundary wall, thereby throwing the street in question into connection with some other street at the other side of the wall. That, I should have thought, was quite clear on the reading of the section. It is said, however, that, if the two walls were not lawfully in position, and had no right to be there, the corporation were entitled to treat them as mere obstructions to the road, and that they could disregard them, and, having passed the necessary resolution, proceed to their demolition, and that, as I have said, was apparently the technique which they finally decided to adopt. The whole basis of the argument depends on the proposition that these walls were not rightfully there, and, in reliance on that proposition, it is said, and repeated here, that they were not rightfully there because they were there in breach of covenant. In my opinion, that is not so, for the reasons which I have already given. Even if it had been so, the method adopted by the corporation would have been quite illegitimate. The resolution purporting to put this section into operation would, in my opinion, even if these walls were there in breach of covenant, have been inoperative. The proper course, if the corporation had been right upon that point, would have been to secure the removal of the walls by proper procedure, and then proceed to put sect. 19 into operation. However, that is by the way. The real and substantial reason is that these walls were not erected in breach of covenant at all. They were not erected in breach of the bye-law, as I have said, and they were not erected in violation of the provisions in sect. 26, unless it be that they were buildings within the meaning of that section; and, even if that had been so—and I will assume for this purpose that it was so—the corporation could not, by pulling them down under that section and then calling in aid the Private Street Works Act, 1892, s. 19, give themselves the right to require that these roads should be left open for ever. The most that they could have done under sect. 26 would have been to produce a state of affairs in which the right of the company to erect a fence or other obstruction, or a wall, at that point would be limited so as not to obstruct access to the sewer or impose a weight upon it—a thing which could quite easily have been done—at the same time preserving the rights of the company to keep their boundary properly and satisfactorily closed. Having regard to the fact that that was all that sect. 26 of the Act of 1875 could ever have enabled them to accomplish, it is quite manifest that to try to treat the whole road, including the site of the wall, as being an open street within the meaning of sect. 19 must be ill-founded. Accordingly, in my opinion, the argument based on the Private Street Works Act fails.

The order made by Bennett, J., was one under which it was declared that the company were entitled to re-erect the walls as they had been before they were pulled down. It is to be noticed that the Public Health Act, 1875, s. 26, is repealed by the Public Health Act, 1936. That Act came into operation, I think, on Oct. 1, 1937, and under sect. 25 of that Act the law is modified. It is provided that, in cases where plans of buildings, or extensions of buildings, require the submission of plans in accordance with building bye-laws, then the authority is entitled to reject the plans if the building or extension goes over a sewer. Subsect. (3) provides for the case of a building which has been erected over a sewer without the consent required by sect. 26 of the Act of 1875, and enables the local authority to serve notice to pull down, and the provisions of the Act in relation to the service of notices and appeals, and so forth, would apply to any such notice. The walls were pulled down after this Act came into operation, but we are told that now they have been rebuilt in their previous form, in accordance with the declaration of Bennett, J. The question as to the applicability, in those circumstances, of sect. 25 (3) might have been an interesting one, and might have required discussion. With reference to the date of the pulling down of the walls, I can reinforce the argument as to the absence of any intention to pull down under the Public Health Act by pointing out that no attempt was made to serve any notice, such as would have been required under sect. 25 (3) of the Act of 1936. However, that is in parenthesis. The walls have now been rebuilt. At the time when the judge's order was made declaring the right to rebuild them, no point was taken on behalf of the corporation that, in view of sect. 25 of the Act of 1936, plans would require to be deposited. This being so, in my opinion the judge was right in not imposing any limitation in the order referring to the Public Health Act, 1936, s. 25. If the corporation had wished to take the point that the court ought not to declare a right to rebuild the walls without saving their rights under the section, the corporation could have taken that point then and there, and it would have been a matter for argument in the first place as to whether or not these walls were buildings or extensions of buildings in respect of which plans would require to be deposited in accordance with the local bye-laws. No such suggestion was made, and, in my opinion, in the light of that, it was right to assume, and I propose to assume, that the walls in question A could not be described as buildings of that character, and that, accordingly, there is no objection under sect. 25 to their erection or their continuing existence. That being so, I do not see any necessity to do that which at one time it appeared we might have to do—namely, impose some qualification on the order of BENNETT, J. The result is B that the appeal fails, and must be dismissed with costs.

CLAUSON, L.J.: I agree, and I do not find it necessary to add anything.

GODDARD, L.J.: I agree.

C *Appeal dismissed with costs.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Arthur Holt*, Town Clerk, Oxford (for the appellants); *Hancock & Scott* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

D

STIMSON AND ANOTHER *v.* STANDARD TELEPHONES & CABLES, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and du Parcq, L.JJ.), **November 1, 2, 1939.**]

E *Factories and Workshops—Statutory duty—Dangerous machinery—Breach of statutory duty cause of accident—Onus of proof—Factory and Workshop Act,* 1901 (*c.* 22), *s.* 10.

Workmen's Compensation—Alternative remedies—Election—Receipt of compensation—Whether contract was for infant's benefit—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 29.

F The defendants were manufacturers of electrical apparatus, and employed the infant plaintiff in a room used for the production of blue prints and working drawings used for getting out specifications and for assembling the apparatus manufactured in the factory. On Apr. 15, 1935, the infant plaintiff was injured while working a drying machine consisting of a large heated drum about 20 ins. in diameter revolving at G the rate of 1 in. per second with a roller across its full width near the top, and similar rollers at the top and the rear of the machine. A canvas-like material passed round these rollers, making contact with the drum about 6 ins. behind the front roller and leaving a gap of 2 ins. between the front roller and the surface of the drum. The infant plaintiff was placing a wet blue print on the drum with her right hand and holding a packet of sweets in her left hand when her hand was caught between H the canvas and the drum and her hand and arm were severely burnt. She was paid workmen's compensation until Mar., 1936, when the defendants proposed to reduce the payments. In May, 1936, arbitration proceedings in respect of this reduction were threatened. In June, 1937, an action at law was first threatened, and in July, 1937, the present action was commenced:—

HELD: (i) the machine was a dangerous machine, which the defendants were under a statutory duty to fence, and the plaintiff was injured by reason of the defendants' failure to perform their statutory duty.

(ii) when the plaintiff had proved the breach of statutory duty and that the accident could have been caused by that breach of statutory duty, it was unnecessary for her to disprove other possible causes of the accident.

(iii) the plaintiff was not guilty of contributory negligence.

(iv) the acceptance of workmen's compensation payments, in the circumstances, did not preclude the plaintiff from recovering damages at common law, as she was an infant, and the agreement to accept compensation was a contract which was not for her benefit.

Decision of Hilbery, J. ([1939] 2 All E.R. 441) *reversed.*

[**EDITORIAL NOTE.** The main point of interest in this decision is the distinction drawn between this case and *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (2). This distinction is based upon the fact that in the present case the plaintiff was an infant at the time of the acceptance of the compensation payments, and she would therefore not be bound by that acceptance unless it could be shown to be for her benefit. The second point of interest is the application of the law as recently laid down in the House of Lords in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1), where the principles applicable in cases of death or injury due to breach of statutory duty in failing properly to fence dangerous machinery were fully considered. Attention must also be directed to the judgment of du Parcq, L.J., who points out that a paraphrase of the words of his judgment in the editorial note to *Walker* v. *Bletchley Flettons, Ltd.* (6) does not fully express the meaning of the words actually used by him in that judgment.

As to Contributory Negligence in Actions for Damages for Breach of Statutory Duty, see HALSBURY, Hailsham Edn., Vol. 23, p. 686, para. 969; and for Cases, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.

As to Alternative Remedies, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 195, 196, paras. 430, 431; and for Cases, see DIGEST, Vol. 34, pp. 490-492, Nos. 4063-4071. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 478-483.]

Cases referred to:

(1) *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; Digest Supp.

(2) *Perkins* v. *Hugh Stevenson & Sons, Ltd.*, [1939] 3 All E.R. 697; Digest Supp.; 161 L.T. 149.

(3) *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K.B. 225; 34 Digest 492, *4070*; 73 L.J.K.B. 739; 90 L.T. 838; 6 W.C.C. 48.

(4) *Murray* v. *Schwachman, Ltd.*, [1938] 1 K.B. 130; [1937] 2 All E.R. 68; Digest Supp.; 106 L.J.K.B. 354; 156 L.T. 407; 30 B.W.C.C. 466.

(5) *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.*, [1939] 2 All E.R. 132; Digest Supp.; 32 B.W.C.C. 37; *revsd.*, [1939] 4 All E.R. 34.

(6) *Walker* v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.

(7) *Hindle* v. *Birtwistle*, [1897] 1 Q.B. 192; 24 Digest 909, *71*; 66 L.J.Q.B. 173; 76 L.T. 159.

(8) *Sutherland* v. *James Mills, Ltd., Executors*, [1938] 1 All E.R. 283; Digest Supp.

(9) *Higgins* v. *Harrison* (1932), 25 B.W.C.C. 113; Digest Supp.

Appeal by the plaintiffs from a judgment of Hilbery, J., dated Apr. 4, 1939, and reported [1939] 2 All E.R. 441, where the facts are fully set out. The second plaintiff was the father of the infant plaintiff and had been joined for purpose of recovering special damages. The substantial appellant was the infant plaintiff.

A. Aiken Watson for the appellants.

F. A. Sellers, K.C., and *Martin Jukes* for the respondents.

Watson: The substantial point for decision, so far as the appellants' case is concerned, is whether or not the infant appellant, who sustained injury while working the machine, is disentitled to recover damages because she failed to show how the accident occurred. The judge seems to have assumed that the appellant had to satisfy the court that the dangerous machine was the proximate cause of the accident. None of the decided cases, however, goes so far as that. If it is established that the dangerous character of the machinery materially contributed to the injury, it is for the employer to show that the injury was caused by the workman's own blameworthy conduct. The judge used words which amount to saying that the onus was upon the appellant in this case to disprove any possibility of contributory negligence. It is, however, for the employer to establish contributory negligence. It is sufficient, on behalf of a workman, to show a causal connection between a breach of statutory duty and the accident. In the present case, the statement of the infant appellant that she could not say how the accident happened is a statement that ought to be accepted. *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1) disposes of any question of law. The conditions laid down in that case are satisfied here.

Sellers, K.C.: The judge came to the right conclusion, and gave good grounds for his decision. There are, however, further grounds upon which the respondents can rely. The infant appellant received workmen's compensation for a period of 12 months. If that does not bar the appellants' claim, it is open to the court to say whether or not the receipt of workmen's compensation was for her benefit. It was for her benefit. Further, the machine was not a dangerous machine, and it did not require fencing. Even if there was a switch, there was no danger flowing from it. There was no breach of the Electricity Regulations, 1908, reg. 12. On behalf of the appellants, it has been argued that there was a breach of statutory duty. The infant appellant had failed to prove that her injury was caused by breach of a statutory duty. If the court should come to a different conclusion on that point, there was contributory negligence on the part of the infant appellant. In two recent cases, the Court of Appeal has given a decision on the position of an adult under the Workmen's Compensation Act, 1925, s. 29, where payments of compensation have been made. The present case, however, concerns an infant. As I understand the decision in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (2), the basis of the decision was not election, but the actual receipt of workmen's compensation. The Workmen's Compensation Act, 1925, is for the benefit of workmen, and its terms apply to adults and infants alike. The receipt of workmen's compensation concludes the matter. The doctrine of infancy is not applicable to workmen's compensation. The point is sufficiently covered by *Perkins'* case (2) and by *Selwood* v. *Towneley Coal & Fireclay Co., Ltd.* (5). There is no distinction between the case of an adult and an infant. In *Higgins* v. *Harrison* (9), the judge held that there was a ground of action at common law, but he found that the agreement to accept workmen's compensation was, in that case, for the infant plaintiff's benefit. There is no way in which the accident could have happened without intention or negligence on the part of the appellant. [Counsel referred to *Murray* v. *Schwachman, Ltd.* (4) and *Stephens* v. *Dudbridge Ironworks Co.* (3).]

Watson in reply.

SIR WILFRID GREENE, M.R.: In this case, I shall confine my remarks to those matters which have been argued before us, and I shall not rehearse the facts of this case, because they are for present purposes sufficiently stated in the judgment of the judge.

There is one matter which I can get rid of at once—namely, the question whether or not the machine in question was a dangerous machine, so as to impose upon the employers a duty of fencing under the Factory and Workshop Act, 1901, s. 10. On that matter, the judge found in favour of the plaintiff. We have had various matters urged upon us by counsel for the respondents with a view to persuading us that that finding was wrong. It is sufficient for me to say that the reasoning of the judge on that point commends itself to my mind, and I think his finding was not only justified but also right. I therefore approach this appeal on the footing that the particular machine was a piece of dangerous machinery, which the employers were under a statutory obligation to fence. That statutory obligation they did not carry out. The plaintiff unquestionably suffered her injury through her hand being crushed between the stretched canvas and the drum of the machine. It is not disputed that, if the machine had been fenced, as it well could have been, the accident would not have taken place. On those matters, there is no dispute at all. The precise circumstances in which the hand came to be in that place were not established in such a way as to enable the judge to come to any definite finding upon that matter.

On that basis of fact, the judge held that, although there was negligence on the part of the employer in not providing the fence, it was not established to his satisfaction that the failure to provide the fence was the cause of the accident. In my opinion, the judge did not apply the true principle of law applicable to matters of this kind. When an employer places upon his premises for use in his factory a dangerous machine which is unfenced, he is by that act alone being negligent towards the employees in general, or towards such of them as may find themselves in the neighbourhood of the machine. However, that, so to speak, is negligence in the air, just as driving a motor car negligently on the road is negligence in the air. No right of action arises unless and until some person to whom a duty to take care is owed suffers some damage attributable to that negligence. In the present case, as I have said, the part of the machine which caused the injury was a dangerous part of the machine. The injury would not have been caused if the statutory duty had been performed. In my judgment, those two circumstances together are sufficient to establish the necessary causal connection between the A negligence of the employer and the injury suffered by the plaintiff.

When that stage is reached, and not until that stage is reached, the further question arises, aye or no was the plaintiff guilty of contributory negligence in such a way as to deprive her of the right to recover? In my opinion, it is incorrect to treat the necessity of proving causal con- B nection between the breach of duty and the accident as though that were the same thing as saying that the plaintiff must establish that the accident took place otherwise than by some intentional act on her part. The judge, in my view, went wrong in that respect.

I have put quite shortly in my own words what I understand to be C the principles applicable on the facts of this case, and I will cite one or two short passages from the opinions in the House of Lords in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1). Those passages, taken in their context, and in the light of the facts in that case, appear to me to be in accordance with what I have said, and to justify the proposition D which I have advanced. First, I find this in the opinion of LORD MACMILLAN, at p. 732:

> The mere fact that at the time of an accident to a miner his employers can be shown to have been in breach of a statutory duty is clearly not enough in itself to impose liability on the employers. It must be shown that the accident was causally associated with the breach of statutory duty. E

I take that to mean this. To adopt an example put by MACKINNON, L.J., in the course of the argument, it would not be sufficient to show that a workman was found in the neighbourhood of a dangerous machine unconscious, with a wound upon him which might have been caused by F the dangerous part of the machine, or might have been caused in some other way by the use of, for instance, a hand tool which the workman had to use. If that were all that appeared, then it would not be shown—although the breach of statutory duty would be established owing to the failure to fence the machine—that that accident was causally associated G with the breach of the statutory duty, because the facts would be equally consistent with its having been due to some other cause. LORD MACMILLAN proceeds thus, at p. 733:

> While the precise manner in which the deceased met his death remains unascertained because there was no eye-witness of the accident, it has been proved to demonstration that if it had not been for the respondents' breach of their statutory H duty the accident would not have happened. The respondents' breach of duty was clearly a cause of the accident. Having thus causally connected the accident with the respondents' breach of duty, I do not think that it was incumbent on the appellant to eliminate and disprove all conjectural possibilities that the deceased may himself have been in some way careless of his own safety.

Those passages show quite clearly what LORD MACMILLAN means by the causal association the establishment of which is sufficient to connect the accident with the breach of duty. Then LORD WRIGHT says, at pp. 734, 735:

> It is in my opinion clear that if at the material time the machine had been fenced, the man could not have been killed, or even come to any serious harm. His death was caused by the absence of fencing. Merely to slip, unless in proximity to the unfenced machine, would have caused at most a bruising or by very bad luck perhaps a broken bone. The actual death was caused because the man A was drawn into the open space, that is, it was caused by the want of fencing.

Then LORD PORTER says, at p. 743:

> Undoubtedly the absence of the guard contributed to the injury which caused the death of the workman. Had the guard been in its place the accident would not have happened. B

I have extracted from those opinions the view of the law applicable to the facts of this case, which I have shortly stated, and, therefore, I find myself unable to agree with the finding of HILBERY, J., on that matter.

The next matter which arises is that of contributory negligence. The burden of establishing contributory negligence is, of course, upon the C defendants. In that respect, the judge was unable to find, on his view of the evidence, that contributory negligence had been established. Counsel for the defendants called our attention to several circumstances in the case from which, he said, the judge ought to have drawn the inference that the substantial cause of this injury was, not the breach of D duty, but the actual contributory negligence of the plaintiff herself. I have carefully considered the various matters put before us by him, and I do not find myself able to differ from the conclusion to which the judge came upon that part of the case. It is perfectly true that the girl did not, although pressed, give an explanation of how the accident happened, E and the judge took the view that she could have explained it if she had wished. That does not mean, however, that he was bound to draw an inference against her to the effect that she had been guilty of some act or other which was the substantial cause of the accident. After seeing her and weighing all the evidence, the judge came to the conclusion that F contributory negligence was not established, and I cannot see my way to differ from that finding.

The only other questions which fall for decision are two which arise by reason of the circumstance that the plaintiff or her legal advisers and her father on her behalf applied for, received, and accepted as such, G payments under the Workmen's Compensation Act. It is clear, I think, that the advisers of the plaintiff (in which I include the solicitors and her father) did in fact claim those payments and receive them on her behalf, receiving them with the full knowledge that they were, and with the intention that they should be, Workmen's Compensation Act payments. H It is said that, once that circumstance is established, it follows from the decision of this court in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (2) that the plaintiff cannot thereafter resile, and demand damages at common law. It is contended that, once one finds that money has been paid under the Act for the purpose of discharging a liability under the Act, that is enough, and the fact that the recipient is an infant has nothing to do with the matter. In my opinion, the authority of *Perkins'* case (2) does not assist the respondents in this case. That was a case of an adult who had made a claim under the Act, and had accepted money under it. The question which we had to consider in that case is, I think, A stated in my judgment as follows, at p. 702 :

> What is to happen where the workman, having at the time of making his claim and receiving the money *ex hypothesi* no knowledge of his right of option, nevertheless receives and puts into his pocket money paid in pursuance of that claim and in liquidation of the employers' statutory liability under the Act ?

B In other words, we were dealing there with a case where the quality of the payment made by the employers was between the parties irrevocably fixed as a payment under the Workmen's Compensation Act in discharge of the employers' liability. In my opinion, in order that a payment must have that quality, it is not sufficient that there should be a mere C passing of money from the employer to the employed. Nor is it sufficient that the passing of that money should be accompanied by an intention in the mind of the employer alone that the payment should be a Workmen's Compensation Act payment. In order that the payment may have the necessary quality to operate as a discharge of the liability of D the employer, it must be paid as a Workmen's Compensation Act payment, and it must be received also in that quality.

In the case of adults, no difficulty arises in dealing with that particular matter, but, in the case of an infant, once it is clear that, in order to find the requisite quality in the payment, a mental operation on the E part of the recipient is required, the question at once arises whether or not it was for the infant's benefit that that particular decision should be taken. If the payment is made under an agreement, if the parties rest, not merely on the statutory position, but also on a contractual position, it is clear that the question of the infant's benefit becomes immediately F relevant. That appears from *Stephens* v. *Dudbridge Ironworks Co.* (3) and from *Murray* v. *Schwachman, Ltd.* (4). In my judgment, quite apart from cases where there is an actual contract, where there is a mental operation of the infant, whether it is in the exercise of the option before receiving payment or whether it is looked at from the point of G view of actual receipt of payment, the question must always be investigated, was it for the infant's benefit that that payment should be made ? I find nothing in the judgment in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (2), or in the later case in this court in which that judgment was followed, which in any way supports the view put forward by counsel H for the defendants.

That leaves one question only, which is whether or not it is shown that the decision to take these payments as payments under the Act, and accept them as such, was for the infant's benefit. Questions of that kind are often difficult. The judge in the present case, although it was not necessary for him so to find, in view of his decision on the main part of the case, nevertheless took the view that it was not for the infant's benefit. In my opinion, he was right upon that. The test must be applied, of course, at the relevant date. In this case, the relevant date was the date when the first payment was made in pursuance of the claim which had been put forward. That was very shortly after the accident, at a time when the full result of the accident was not apparent. That full result only became apparent some time later, and in point of fact has resulted in permanent incapacity, owing to the condition of the thumb. It has also resulted in a permanent disfigurement, which, to a young woman of that age, may be a source, not merely of annoyance, but also of substantial loss of happiness in life hereafter.

The task which the court has to perform in these cases is to put itself in the place of a hypothetical adviser who would be advising the infant, with knowledge of all the facts which were known at that time, and with a competent knowledge of the law. I think that that way of approaching the question is justified by what was said in this court in *Murray* v. *Schwachman, Ltd.* (4) in the judgment of Greer, L.J., at p. 146. With that view of the matter the other members of the court concurred.

Having put myself in that position as best I can, I would have to consider what the legal risks in the matter were, and what the chances of failure would have been in a claim at common law. The two matters in respect of which it is suggested there would have been doubt on legal questions are, first of all, the question of liability and the proof requisite in cases of breaches of statutory duty, and, secondly, the applicability or otherwise of the doctrine of contributory negligence to such cases. It is perfectly true that, at the relevant time, the House of Lords had not yet declared that the doctrine of contributory negligence applied to such cases, but it had been so held some years before by this court, and it was generally considered, I think, that that decision would be upheld if and when the House of Lords came to deal with the matter. I do not find there any legal problem which would have given a competent adviser any difficulty. On the other question, I am again unable to see that the hypothetical adviser would have found it impossible or difficult to give correct advice upon the matter.

When one looks at the factual aspect of the case, here was a young girl at the beginning of life, suffering what has turned out to be not merely a permanent incapacity, which would or might affect her earning power, but also an injury which would affect her appearance, and might affect her ability to play games and generally enjoy life in other respects—matters which do not come into account in assessing compensation under the Workmen's Compensation Act, but which can be taken into account in a claim at common law. Workmen's compensation is based on the principle of earning capacity, and on that principle only, and has nothing to do with these other heads of damage. One must remember also that a workman who commences proceedings at common law does not thereby forfeit his right to compensation under the Act. If he fails to establish a case at common law, but establishes facts which would entitle him to compensation under the Act, he can obtain that compensation, subject to the risk of costs being deductible from the compensation assessed in his favour.

Taking all those considerations into account, and not attributing to the hypothetical adviser any extraordinary prescience or wisdom, I cannot help thinking that the proper and sound advice which should have been given to this infant at that time would have been that she had better take proceedings at common law, and not accept payment under the Workmen's Compensation Act. These questions are always difficult, and different minds may take different views of the facts of any particular case. I have done my best to assess the various matters which I think it proper to take into account, and that is the conclusion to which I have come, after listening to the arguments, very careful in this respect as in all others, put before us by counsel for the defendants.

In the result, the appeal must be allowed, with costs here and below. No attack has been made upon the figure of damages assessed by the judge, and there must be judgment for the plaintiff for the figure which the judge assessed, subject to the fact that the plaintiff is willing to submit to deduction from that amount the sum received under the Workmen's Compensation Act, a matter of £22 as against a figure of £767 assessed by the judge. That deduction of £22 is agreed to by counsel on behalf of the plaintiff, and, therefore, there is no necessity to enter into a discussion of the question, which might be an interesting one, whether or not, by any legal machinery, this plaintiff could be forced to repay that amount, or give credit for it in the action. That investigation we are freed from, in view of the fact, as I have said, that that is conceded here.

MacKinnon, L.J.: I agree. I do not wish to repeat anything which has been said by Sir Wilfrid Greene, M.R., but I am tempted to say a word about the very last matter to which he referred. This court, in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (2) and *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.* (5), came to the clear conclusion that, if an adult accepted payment under the Workmen's Compensation Act of compensation paid as such and received as such, that debarred him, under sect. 29, from subsequently bringing any action at common law. So far as I was concerned, one of the reasons that seemed to me conclusively to lead to that result was the fact that the plaintiff there, who was making the claim, had received £81 in the guise of that compensation. If he had succeeded in the action which he was then bringing at common law, I could see no legal ground on which the employers could claim that money back. If that were so, the result appeared to me to be a clear breach of the provisions of sect. 29 of the Act of 1925, which says that an employer shall not be liable to pay compensation both independently and also under the Workmen's Compensation Act, because he will then have paid compensation and will be called upon to pay again outside the Act.

There was also in existence the principle previously laid down by this court in *Stephens* v. *Dudbridge Ironworks Co.* (3) and *Murray* v. *Schwachman, Ltd.* (4), in both of which it was held that, where the A claimant who had received compensation under the Act was not an adult but a minor, it was the duty of the court to consider whether or not the acceptance of compensation under the Act was for the benefit of the infant. If it was not for his benefit, then he would not be debarred, by reason of sect. 29, from bringing a common law action. In those B cases, nobody raised the possible argument as to what was to happen to the money that the infant had been paid and had received as compensation under the Act. It would be unfair for him to keep that money as well as get damages at common law, but what is the legal ground on which he could be made to give credit for it? I am bound to say that C I do not quite know what the answer to that point is. It is not necessary to investigate that further, because in this case, acting quite properly, of course, the plaintiff is content to give credit against the damages assessed by the judge in the common law action for the amount previously paid by way of workmen's compensation. D

I confess that I do feel some difficulty about the question how far the decisions in *Stephens* v. *Dudbridge Ironworks Co.* (3) and *Murray* v. *Schwachman, Ltd.* (4) are precisely consistent, in all their implications and results, with the decisions in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (2) and *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.* (5), and E what precisely is the line of reconciliation, if reconciliation be needed, between those two sets of authorities, but that really, as I say, does not arise in this case. With the result proposed by SIR WILFRID GREENE, M.R., I agree.

F

DU PARCQ, L.J.: I also agree, and I have little to add. If I may say so, I share the difficulty which has been expressed by MACKINNON, L.J. I may add, perhaps, that it is to be hoped that *Murray* v. *Schwachman, Ltd.* (4), on the one hand, and *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (2), on the other, may be considered some day G by the House of Lords. I think I am right when I say that this court was disposed to give leave to appeal to the House of Lords in *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.* (5), but there was, as it happened, an insuperable bar to giving such leave, because the parties had bound themselves by an agreement not to appeal beyond the Court of Appeal. H

There are only two other points upon which I have anything to say. I agree with everything that has been said by SIR WILFRID GREENE, M.R., on the other points, including those to which I am now about to refer.

With regard to the question whether this acceptance of money as compensation under the Workmen's Compensation Act is shown to have been done for the benefit of the workman, I find it very difficult to see any answer to the point raised against counsel for the defendants in the fact that this money was accepted within a very short time—in fact, a few days or a week or so after the accident happened. Apart from everything else which has been said, it seems to me quite impossible to say that it was for the infant's benefit at that early stage to accept the money as compensation, so precluding herself from taking proceedings at common law. Any sagacious adviser, I think, when asked to advise what course should be taken, even if he did not at once say, "Bring an action for damages at common law," would certainly have said, "One may as well wait and see what will happen about this injury till the six months available under the Act have nearly expired."

The only other point about which I have reason to say a few words is whether or not this was a dangerous machine. Some part of the argument of counsel for the defendants was perhaps not unfamiliar to me, because it was a little reminiscent of what I heard from him in *Walker* v. *Bletchley Flettons, Ltd.* (6). In that case also, counsel for the defendants properly referred to the well-known decision in *Hindle* v. *Birtwistle* (7). I used a few words in *Walker* v. *Bletchley Flettons, Ltd.* (6) which have been cited, if I may respectfully say so, quite correctly by the judge. I think, however, that perhaps I was not quite correct in using the words which I did, because, although I think that they were really accurate, apparently they were open to some misconception. What I said with regard to *Hindle* v. *Birtwistle* (7), paraphrasing it, was that, when one was considering whether the machinery was dangerous, it was necessary to assume, as Wills, J., had said, that the people who used it would sometimes be careless. I said that I thought it was not inconsistent with what Wills, J., had said in his judgment to say [p. 175]:

> . . . that a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur.

The headnote proper in the All England Law Reports accurately sets out what I said, but there is an editorial note which, purporting to state the effect of my judgment, says:

> There must therefore be some criterion of danger apart from the mere happening of the accident, and it is stated that a part of a machine is dangerous if it can be a possible cause of injury to anyone acting reasonably.

That is not only not what I said, but, I think, almost exactly the opposite of what I said. As I am afraid some people do not read the whole of the judgment—perhaps it is too much to expect that they should read the whole of my judgment—but are satisfied with the conclusions in the headnote, and, it may be, perhaps, concentrate even more on the editorial note than the headnote, I feel it desirable to take this opportunity to correct that misapprehension on the part of the editor.

With regard to *Hindle* v. *Birtwistle* (7), I would only like to add that that case has been cited very many times, sometimes in my hearing, in the Divisional Court. Rather than use any words of my own, I should like to quote a few lines from one of the many judgments in which Lord Hewart, L.C.J., has had to refer to that case. The case to which I am going to refer, which is typical of many others, is *Sutherland* v. *James Mills, Ltd., Executors* (8). Lord Hewart, L.C.J., says, at p. 285:

> The justices, apparently, followed the line of reasoning which had been suggested—that they might regard this machinery as not dangerous in fact, because, in view of its history, persons might be reasonably led to think that it was not dangerous. The section is dealing with machinery which is dangerous in fact. I cannot help observing that the particular passage in the case of *Hindle* v. *Birtwistle* (7), the flying-shuttle case, has once more been adduced as having a relation to this case. The words of the judge which are so often referred to are to be read, in my opinion, with reference to the subject-matter of that case. That case turned upon an accident that had been caused by means of a flying shuttle—that is to say, by means of a part of the machinery which was doing something which it was never intended to do, and was not expected to do. It is very difficult usefully to apply observations made upon that case to cases where machinery is employed for the very purpose for which it is intended to be employed, and where the accident takes place by reason of the fact that a workman—it may be carelessly, it may be hurriedly, or it may be accidentally in the proper sense of the term—brings a part of his body into contact with a dangerous part of the machinery.

I think that those words may usefully be cited with the judgment in *Hindle* v. *Birtwistle* (7) whenever it is thought desirable to refer to *Hindle* v. *Birtwistle* (7). I entirely agree that this appeal should be allowed, and with the result mentioned by Sir Wilfrid Greene, M.R.

Appeal allowed with costs in both courts. Judgment for the plaintiffs for £767, *credit being given to the defendants* (*counsel for the infant plaintiff submitting*) *for* £22.

Solicitors: *Royds, Rawstorne & Co.* (for the appellants); *Carpenters* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

R. *v.* BOLTON RECORDER, *Ex parte* McVITTIE.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **November 10, 1939.**]

Public Health—Dangerous and dilapidated structure—Order to repair or demolish—Works of repair unspecified in order—Whether order defective—Public Health Act, 1936 (*c.* 49), *s.* 58.

A cinema was damaged by fire, with the result that it became a dangerous or dilapidated building or structure. A complaint was made to the justices, who made an order under the Public Health Act, 1936, s. 58, calling upon the owner to execute works of repair or restoration, or, if he so elected, to take such steps by demolishing the structure and removing any rubbish resulting from the demolition as might be necessary for remedying the cause of complaint. The order was confirmed by general quarter sessions, whose decision was challenged by the applicant on the ground that it was defective and bad in law in that it purported to confirm the justices' order, which did not specify the works of restoration or repair to be executed and/or things to be done for the remedy of the cause of complaint:—

Held: an order made under the Public Health Act, 1936, s. 58, since it must give the owner the alternatives of repairing or demolishing the building, need not specify the particular repairs necessary for remedying the cause of complaint.

Decision of Divisional Court ([1939] 2 All E.R. 334) *affirmed.*

[**EDITORIAL NOTE.** Where orders for work to be done are made by a local authority under statutory authority, it is usually necessary for the requirements of the local authority to be stated with some particularity, but in the present case it is held that the matter is one for an order in general terms. In fact, the Act itself allows the owner to elect how he will deal with the ruinous or dilapidated building so that it may no longer be a detriment to the amenities of the neighbourhood.

As to Dilapidated Structures, see HALSBURY, Hailsham Edn., Vol. 26, pp. 352-354, paras. 696, 697; and for Case, see DIGEST, Vol. 38, p. 209, No. 436.]

Appeal by McVittie from an order of Lord Hewart, L.C.J., Macnaghten and Singleton, JJ., sitting as a Divisional Court, dated Mar. 30, 1939, and reported [1939] 2 All E.R. 334. The facts are fully set out in the judgment of Scott, L.J.

R. M. Montgomery, K.C., and *J. W. Stansfield* for the appellant.

W. Gorman, K.C., and *W. G. Morris* for the respondents.

Montgomery, K.C.: This is a new section, but the words are in effect the same as the requirements of the Public Health Act, 1875, ss. 94, 95. A long series of authorities under these sections shows that the property owner is entitled to know exactly what he is required to do. Since the words are to the same effect, sect. 58 should be construed in a similar way to that in which the nuisance sections of the 1875 Act were construed.

Scott, L.J.: In this case, the owner of a piece of land in Bolton, on which, down to 1930, there was a cinematograph theatre which in that year was burned to the ground, although a large number of the steel pillars of the building were left untouched by the fire, was ordered, in 1937, to restore or repair the building or remove the ruinous structure and make the site presentable, so that it should no longer impair the amenities of the town of Bolton. From an order made by the magistrates, and confirmed by the deputy-recorder, there was an appeal to the Divisional Court by *certiorari*, asking that the order should be quashed. In March, 1939, the Divisional Court discharged the rule *nisi* which had been granted, and upheld the validity of the order made. The owner appeals to this court, submitting that the Divisional Court ought not to have discharged the rule, but ought to have made it absolute. The proceedings were taken under the Public Health Act, 1936, s. 58 (1), which provides as follows:

> If it appears to a local authority that any building or structure, or part of a building or structure—(*a*) is in such a condition . . . as to be dangerous . . . or (*b*) is by reason of its ruinous or dilapidated condition seriously detrimental to the amenities of the neighbourhood, the authority may apply to a court of summary jurisdiction, and the court may [in the first-mentioned case, deal with the danger, and] (ii) in the second-mentioned case, make an order requiring the owner of the building or structure to execute such works of repair or restoration or, if he so elects, to take such steps by demolishing the building or structure or any part thereof

> and removing any rubbish resulting from the demolition, as may be necessary for remedying the cause of complaint.

Then subsect. (2) provides as follows:

> If the person on whom an order is made under subsect. (1) of this section for the execution of works, or the demolition of a building or structure or of any part of a building or structure, and the removal of any rubbish resulting from the demolition, fails to comply with the order within the time therein specified, the local authority may execute the order in such manner as they think fit and may recover the expenses reasonably incurred by them in so doing from the person in default, and without prejudice to the right of the authority to exercise those powers, he shall be liable to a fine . . .

The order made by the magistrates in this case was made in the precise words of the section, following a complaint lodged on behalf of the local authority, also in the precise words of the section. The complaint was made by the town clerk as follows:

> . . . for that it appears to the council of the said county borough being the local authority within the meaning of the Public Health Act, 1936, that a certain structure situate in Tonge Moor Road in the said county borough formerly known as "Tonge Picturedrome" is by reason of its ruinous condition seriously detrimental to the amenities of the neighbourhood and the said local authority by the said complainant on their behalf intends to apply to the court of summary jurisdiction mentioned below for an order in accordance with the provisions of the Public Health Act, 1936, s. 58, requiring you the owner of the said structure . . .

Then follow the words of the section.

The order of the summary jurisdiction court, which was satisfied that the words of the complaint were well-founded, was precisely in those words, ordering:

> . . . the owner of the said structure to execute such works of repair or restoration or if he so elects to take such steps by demolishing the structure or any part thereof and removing any rubbish resulting from the demolition as may be necessary for remedying the cause of complaint.

The ground upon which the motion for a rule *nisi* for *certiorari* was moved on behalf of the owner was that, under the section, an order in that form was not authorised. It was urged that the section ought to be interpreted as requiring the authority to specify the precise works of this restoration or repair which the local authority required, and that, as the order did not say that, it was necessarily bad, and not one that was authorised by the section. The Divisional Court, consisting of Lord Hewart, L.C.J., Macnaghten and Singleton, JJ., did, on the showing of cause, discharge the order, and with that decision, and with everything that was said in the three judgments, I entirely agree, and think, therefore, that the appeal should be dismissed.

I add very little. The appellant has put before us photographs of the site in Bolton showing what it looks like from various points of view from the public street. They were exhibited in the original court and in each subsequent court, and it is obvious from those photographs that, ever since the theatre was burned down in 1930, it has been a dreadful eyesore in the street of Bolton where it is. Fortunately, since the Act of 1936 was passed, proceedings on the ground of injury

to the amenity of a neighbourhood are now possible. It is said, as I have already mentioned, that details of what the owner is expected to do ought to be mentioned in the complaint and in the order, and the chief reason put forward for that interpretation of the section is that, in certain nuisance sections which appear in a different part of
A the Public Health Act, 1936, there have been decisions on the wording of those later sections about nuisance under previous Acts which have been re-enacted in that other part of the Act of 1936 in which no option was given to the owner at all. He merely had to abate the nuisance, and it was held that there was an obligation on the prosecuting
B authority to give some information as to what the works should be.

In my view, the Divisional Court was absolutely right in refusing to have the interpretation of this very valuable new section cut down by decisions on a wholly different type of section, because the difference of the purpose and the difference of the language in the section were
C not *in pari materia* with this section which had to be construed. I can see no difficulty in the practical effect of the construction put upon this section by the Divisional Court, because, if the unsightly cause is a comparatively small thing, which may nevertheless be very unsightly, the words " restore or repair " give the owner an ample indication
D of what he has to do. In any case, he knows what his building was, and, if he wants to re-erect it after it has been practically destroyed, he can do so under the form of order made. On the other hand, however, if he recognises that it is not good business to re-erect that old building, then he is not entitled to keep the site disfiguring the neighbourhood,
E as it does, at the expense of the inhabitants of the town, in order that he may wait for some bid from somebody who may, perhaps, use some of the old steel uprights. The practical effect of the provisions is, of course, that, when a complaint is made on the lines of the section, an owner of disfiguring property knows that pressure can be put upon him
F if he does not act, and he always has the opportunity of going to the local authority and saying, " Now that I have got out plans to deal with this site, will you give me a little more time to put up a building ? " These Public Health Acts must be worked with a reasonable spirit of appreciating their true object, and arrangements can be made in most
G cases so that they do not press unduly upon the person who is subjected, or will be subjected, to such an order. Here I adopt the judgment of LORD HEWART, L.C.J., as my own, and add nothing. The appeal will be dismissed with costs.

H CLAUSON, L.J. : I agree.

GODDARD, L.J. : I agree, and I am content to adopt the judgment of MACNAGHTEN, J., as my own. However, in deference to the argument of counsel for the appellants, I would say one word. I do not think that this section has any true analogy with the nuisance section. The nuisance section does not give an option to the householder on whose premises the nuisance is. It requires him to abate a nuisance. There is, no doubt, a line of authority which shows that, when there is a nuisance, the householder may be entitled, in general, to be told what the local authority require to be done in order to abate the nuisance. If this sect. 58 which we are considering were a section which applied to any sort of building which offended against the amenities of a district—in other words, if it were a case dealing merely with the æsthetics of a building—I think that very likely the owner might be entitled to say, " My ideas of art are different from yours. If you object to this building of mine as offending against the amenities of the district, tell me in what way you think it does offend. Otherwise I shall not know whether to repair it in neo-Gothic or bastard-Tudor style." That, however, is not what the section says. The section deals only with a building which offends against the amenities of the neighbourhood because of its ruinous or dilapidated condition. Then the section says that the justices may order a man to repair, to restore or to pull down, and he can choose for himself what he will do. If it is a ruinous or dilapidated building, he can repair it if he likes. Whether there is any real difference between " repair " and " restore " I do not stay to inquire. For myself, I doubt whether there is. He can repair it or restore it or pull it down. He can please himself. I do not think that there is any warrant at all for saying that the justices must dictate or specify exactly what repairs are to be done. They have simply to say : " You have a ruinous or dilapidated building. Repair it or pull it down, whichever you please." Whether or not there be any merits in this appeal, from what I see in these photographs, it is impossible to suppose for a moment that there are any merits in a lot of twisted iron stanchions standing by a residential road in Bolton on what is now a weed-overgrown site. Mr. McVittie must have known perfectly well that all he was required to do was to clear away the rubbish, which is what the section says. If he had cleared away the rubbish, there would have been no trouble. He has chosen to keep this deplorable sight in existence ever since 1930, and now has fought this case up to the Court of Appeal.

Appeal dismissed with costs.

Solicitors : *Peacock & Goddard*, agents for *Percy H. Barker & Co.*, Manchester (for the appellants) ; *Simmons & Simmons*, agents for *P. S. Rennison*, Town Clerk, Bolton (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Applied. MINT *v.* GOOD. [1950] 2 All E.R. 1159.

WRINGE *v.* COHEN.

[COURT OF APPEAL (Slesser and Luxmoore, L.JJ., and Atkinson, J.), **October 23, 24, November 8, 1939.**]

Landlord and Tenant—Want of repair—Collapse of house on adjoining premises—Landlord liable to do repairs—Knowledge of landlord.

Nuisance—House in disrepair—Collapse of house on adjoining premises—Owner liable to do repairs—Knowledge of want of repair.

The plaintiff was the owner of a lock-up shop and the defendant the owner of the adjoining house, which was considerably higher than the plaintiff's shop. The wall next to the plaintiff's shop, which had been in bad repair for some time, collapsed and damaged the shop. The defendant's house was let to a weekly tenant, but it was admitted that the defendant was liable to keep his premises in repair and that there was evidence upon which it could properly be found that, owing to want of repair, his house had become a nuisance. The defendant stated in evidence that the wall was in good repair so far as he knew, but he had not examined it. A builder stated that two years before the collapse he had examined the wall at the defendant's request and that it then looked in a fair state of repair :—

HELD : if, owing to want of repair, premises upon a highway become dangerous, and, therefore, a nuisance, and a passer-by or adjoining owner suffers damage by their collapse, the occupier, or the owner, if he has undertaken the duty of repair, is answerable, whether or not he knew, or ought to have known, of the danger. If the nuisance is created not by want of repair, but by the act of a trespasser or by a secret and unobservable process of nature, neither the occupier or an owner responsible for repair is answerable, unless with knowledge or means of knowledge he allows the danger to continue. The defendant, was, therefore, liable in damages to the plaintiff.

[EDITORIAL NOTE. The point here dealt with is when it is necessary to prove knowledge of want of repair in an action for damages due to a defect in or the want of repair of premises when that action is based on nuisance. It is only where the danger arises from the act of a trespasser or an unobservable process of nature that the knowledge of the owner or occupier is material. In the case of neglect to repair, the owner or occupier is liable whether or not he knew of the want of repair.

AS TO DANGEROUS PROPERTY, see HALSBURY, Hailsham Edn., Vol. 24, p. 49, para. 85 ; and FOR CASES, see DIGEST, Vol. 26, p. 433, Nos. 1517-1519.]

Cases referred to :

(1) *R.* v. *Watson* (1703), 2 Ld. Raym. 856 ; 26 Digest 433, *1517* ; *sub nom. R.* v. *Watts*, 1 Salk. 357.

(2) *R.* v. *Bradford Navigation Co.* (1865), 6 B. & S. 631 ; 38 Digest 42, *247* ; 34 L.J.Q.B. 191.

(3) *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560 ; 36 Digest 177, *221* ; 66 L.J.Ch. 275 ; 76 L.T. 174.

(4) *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588 ; 38 Digest 44, *258* ; 63 L.J.Ch. 36 ; 69 L.T. 361.

(5) *Payne* v. *Rogers* (1794), 2 Hy. Bl. 350 ; 31 Digest 344, *4867*.

(6) *Quarman* v. *Burnett* (1840), 6 M. & W. 499 ; 34 Digest 126, *966* ; 9 L.J.Ex. 308.

(7) *Todd* v. *Flight* (1860), 9 C.B.N.S. 377 ; 31 Digest 345, *4879* ; 30 L.J.C.P. 21 ; 3 L.T. 325.

(8) *Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401 ; 31 Digest 345, *4881* ; 28 L.T. 704.

(9) *Gwinnell* v. *Eamer* (1875), L.R. 10 C.P. 658 ; 31 Digest 345, *4882* ; 32 L.T. 835.

(10) *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; 26 Digest 433, *1519*; 45 L.J.Q.B. 260; 34 L.T. 97.

(11) *Barker* v. *Herbert*, [1911] 2 K.B. 633; 36 Digest 197, *374*; 80 L.J.K.B. 1329; 105 L.T. 349.

(12) *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C.P.D. 311; 31 Digest 344, *4869*; 46 L.J.Q.B. 675.

(13) *Harrold* v. *Watney*, [1898] 2 Q.B. 320; 36 Digest 69, *443*; 67 L.J.Q.B. 771; 78 L.T. 788.

(14) *Palmer* v. *Bateman*, [1908] 2 I.R. 393; 36 Digest 25, case *125xi*.

(15) *Pritchard* v. *Peto*, [1917] 2 K.B. 173; 36 Digest 40, *244*; 86 L.J.K.B. 1292; 117 L.T. 145.

(16) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, *208*; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.

(17) *Noble* v. *Harrison*, [1926] 2 K.B. 332; 36 Digest 189, *316*; 95 L.J.K.B. 813; 135 L.T. 325.

(18) *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L.T. 1; Digest Supp.

(19) *Wilchick* v. *Marks & Silverstone*, [1934] 2 K.B. 56; Digest Supp.; 103 L.J.K.B. 372; 151 L.T. 60.

(20) *R.* v. *Pedly* (1834), 1 Ad. & El. 822; 36 Digest 215, *582*; 3 L.J.M.C. 119.

(21) *Morgan* v. *Liverpool Corpn.*, [1927] 2 K.B. 131; Digest Supp.; 96 L.J.K.B. 234; 136 L.T. 622.

(22) *Mullan* v. *Forrester*, [1921] 2 I.R. 412; 26 Digest 434, case *f*.

(23) *Wilkins* v. *Leighton*, [1932] 2 Ch. 106; Digest Supp.; 101 L.J.Ch. 385; 147 L.T. 495.

APPEAL by the defendant from a judgment of His Honour JUDGE ESSENHIGH given in the Sheffield County Court and dated May 31, 1939. The facts are fully set out in the judgment of the court delivered by ATKINSON, J.

R. T. Monier-Williams for the appellant.

Denis H. Robson for the respondent.

Monier-Williams: The duty to repair is on the occupier, except where the nuisance is caused by misfeasance or where the owner has expressly or impliedly authorised the occupier to commit the nuisance. [Counsel referred to *Wilkins* v. *Leighton* (23).]

Robson: In spite of *Barker* v. *Herbert* (11), the owner might be liable for a nuisance of which he had no knowledge.

Monier-Williams in reply.

ATKINSON, J. [delivering the judgment of the court]: This is an appeal by the defendant from a judgment of the judge of the Sheffield County Court, holding the defendant liable for damages done to the plaintiff's shop by the collapse of part of a house belonging to the defendant. The plaintiff was the owner of a lock-up shop in Proctor Place, a street in Sheffield. The defendant was the owner of the adjoining house, the ground floor of which was used as a shop. The house was considerably higher than the plaintiff's shop. On Nov. 24, 1938, the wall of the defendant's house, constituting the gable-end next to and above the plaintiff's shop, fell on and destroyed the roof of the shop. There was evidence that the pointing of the gable-end was very bad, that the collaring was perished and the wall bulging, and that the wall had been in this defective state for 3 years.

The tenant of the defendant's house was a Mrs. Fairest. She was a weekly tenant, and had occupied the house for about 2 years, using her shop for the business of a florist. She was under no obligation, as between herself and the defendant, to repair. The defendant admitted that he was liable to repair, and had always done the repairs. The judge held that the wall was in a defective condition, and was a nuisance owing to want of repair, and that the defendant was liable to repair. By that he must have meant that the defendant was under an obligation, by agreement with the tenant, to repair. He further held that, in those circumstances, there was an absolute duty on the defendant towards the plaintiff to keep his house in such repair that it did not become a nuisance, and awarded the plaintiff £61 17*s.* 1*d.* damages, and costs. The defendant had given evidence that the wall was in good repair as far as he knew, but he did not suggest that he had examined it, or even looked at it. A builder gave evidence that 2 years ago the defendant asked him to look at the gable-end, and said that it then looked in a fair state of repair.

It was admitted that there was evidence upon which the judge could find that the defendant had agreed with the tenant to keep the premises in repair, and the appeal was argued on that footing. It was also conceded that there was evidence upon which the judge could properly hold that the wall of the gable-end of the house had, owing to want of repair, become a nuisance—that is, a danger to passers-by and adjoining owners. It is contended for the appellant, however, that these findings do not go far enough to establish his liability for the damage caused by the collapse of the wall. It is said that the defendant is liable only if it is found as a fact that he knew, or ought to have known, of the want of repair, that the judge did not so find, and that we ought to send the case back for a new trial. It is said that the judge was wrong in holding that the obligation to repair was absolute.

In our judgment, if, owing to want of repair, premises upon a highway become dangerous, and, therefore, a nuisance, and a passer-by or adjoining owner suffers damage by their collapse, the occupier, or the owner, if he has undertaken the duty of repair, is answerable, whether or not he knew, or ought to have known, of the danger. The undertaking to repair gives the owner control of the premises, and a right of access thereto for the purpose of maintaining them in a safe condition. On the other hand, if the nuisance is created, not by want of repair, but, for example, by the act of a trespasser, or by a secret and unobservable operation of nature, such as a subsidence under or near the foundations of the premises, neither an occupier nor an owner responsible for repair is answerable, unless with knowledge or means of knowledge he allows the danger to continue. In such a case, he has in no sense caused the nuisance by any act or breach of duty. I think that every case decided in the English courts is consistent with this view.

By common law, it is an indictable offence for an occupier of premises upon a highway to permit them to get into a dangerous condition owing to non-repair. It was not and is not necessary in an indictment to aver knowledge or means of knowledge (see *R.* v. *Watson* (1)). The indictment will be found in 3 Ld. Raym. 18 and in 1 Salk. 357. In *R.* v. *Bradford Navigation Co.* (2) at p. 651, Blackburn, J., laid it down as a general principle of law that persons who manage their property so as to be a public nuisance are indictable. In *A.-G.* v. *Tod Heatley* (3) it was clearly laid down that there is an absolute duty to prevent premises becoming a nuisance. In *Rapier* v. *London Tramways Co.* (4), Lindley, L.J., said, at p. 600:

> . . . if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it.

The first case against the landlord to which I shall refer is *Payne* v. *Rogers* (5). The headnote in that case is as follows, at p. 350:

> If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger from the want of repair.

The judgment of Eyre, L.C.J., was as follows [p. 351]:

> Evidence was given of repairs being actually done by the landlord. And I thought at the trial, that though the tenant was *prima facie* bound to repair, and therefore liable, yet if he could show that the landlord was to repair, then that the landlord was liable.

In the same case, Buller, J., said, at p. 351:

> The direction of Eyre, L.C.J., was most clearly right. I agree that the tenant as occupier is *prima facie* liable to the public, whatever private agreement there may be between him and the landlord. But if he can show that the landlord is to repair, the landlord is liable for neglect to repair.

Again in the same case, Heath, J., said, at p. 351:

> If we were to hold that the tenant was liable in this case, we should encourage circuity of action, as the tenant would have his remedy over against the landlord.

The point of the decision seems to be this. Liability can be based on neglect to perform his covenant to repair. By his covenant he had retained the obligation to repair. That obligation had not been performed, and the question of knowledge did not enter into it.

In *Quarman* v. *Burnett* (6), the question was whether the hirer of a carriage and pair and of the driver was liable for the negligence of the driver. Parke, B., said, at pp. 510, 511:

> The rule of law may be, that where a man is in possession of fixed property, he must take care that his property is so used or managed, that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances: but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to personal moveable chattels. . . .

Counsel before us referred to *Todd* v. *Flight* (7), but it has no bearing upon the case before the court. It was an action against an owner who had demised, knowing that the premises were in a dangerous condition and without obtaining any covenant to repair.

The next case to which I wish to refer is *Pretty* v. *Bickmore* (8). The defendant, the owner, had let premises on a lease with a covenant by the lessee to keep them in repair. The flap over a coal-cellar under the footpath was, at the time of the demise, out of repair, so as to be dangerous. The plaintiff was injured by its giving way. It was held that the defendant was not liable, because the duty to repair rested upon the tenant. One would have expected to find some reference to the question of the defendant's knowledge, if it was thought to be relevant. It was certainly not found that the defendant knew of the disrepair, and no reference was made to his knowledge one way or the other. However, BOVILL, C.J., said, at p. 404 :

> In all the cases where the landlord has been held to be responsible, it will be found that he has done some act authorising the continuance of the dangerous state of the premises. The ground of the decision in *Todd* v. *Flight* (7) was, that the declaration contained an allegation that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, and that he kept and maintained them in that state. . . .

Then BOVILL, C.J., at p. 404, quotes ERLE, C.J., in *Todd's* case (7), at p. 390 :

> " . . . and thus he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no default of the lessee, but by the laws of nature." That is wholly inapplicable to the present case. . . .

Therefore, it looks as if the defendant there was not being deemed guilty of negligence. The judgment of BOVILL, C.J., in *Pretty* v. *Bickmore* (8) concluded with these words, at p. 405 :

> If the duty of repairing had rested upon the landlord, no doubt he would have been liable.

The same thing was said by KEATING, J., in that case—namely, that he would have been liable if he had retained the obligation to repair the premises. Both the judges seem to be stating that view quite regardless of any question of whether or not the landlord knew. *Gwinnell* v. *Eamer* (9), which was referred to in argument, does not throw any light on this case. It was an action on the case, where the landlord had let with a covenant by the tenant to repair, and does not throw any light on the case before this court.

Perhaps the most important case for our consideration is *Tarry* v. *Ashton* (10). It is necessary to examine this case with care, and particularly the judgment of BLACKBURN, J. It is a case which, in our view, has been misunderstood in quite a number of later cases. The facts of that case were simple. The plaintiff was walking along the Strand in front of the defendant's house in Nov., 1874, when a large lamp suspended from the front of the house fell upon her and injured her. A man was blowing water out of the gas-pipes. He had placed his ladder against the lamp-bracket. It slipped, and the man fell. The lamp got shaken, and its fastenings broke. In Aug., 1874, the defendant, who had only lately become the tenant of the house, knowing that the lamp and other fittings were of some age, employed an experienced fitter to examine them and put them in thorough repair. After the accident, examination showed that the breakage was caused by the general decay of the connections. The jury found that the defendant was not negligent, and had no knowledge of the want of repair, but that the fitter was negligent. Judgment was entered for the plaintiff, with leave to the defendant to move to enter a verdict for the defendant or for a non-suit. At the time A of the accident in November, it is clear that the defendant had no knowledge whatever of the defective condition of the lamp. It could not be said, and it was not said, that he ought to have known, as a competent fitter had just been employed to make sure that the lamp was in thorough repair. At no time, even in August, did the defendant know of, or even B suspect, disrepair. It was merely that, knowing the lamp was old and might want attention, he took the precaution of employing a fitter to examine it and do whatever might be necessary. In fact, the lamp was in a dangerous condition. It was a nuisance, and the defendant was held liable. Unfortunately, the headnote in the case is inaccurate. C I will not read the first paragraph, but will come to what I think is the inaccuracy :

> HELD, that the plaintiff was entitled to the verdict. By LUSH and QUAIN, JJ., on the ground, that if a person maintains a lamp projecting over the highway for his own purposes, it is his duty to maintain it so as not to be dangerous to the passengers ; and if it causes injury owing to want of repair, it is no answer on D his part that he had employed a competent person to repair it. By BLACKBURN, J., on the ground that under the circumstances of the case, it was shown that defendant knew that the lamp wanted repair in August, and it was his duty, therefore, to put it in reasonable repair, and the person he employed having failed to do so, defendant was liable for the consequences of the breach of duty.

It is perfectly plain from the facts of the case that, so far from it being E shown that the defendant knew that the lamp wanted repair in August, the contrary was the fact. BLACKBURN, J., as he then was, said, at p. 318 :

> It appears that the defendant came into occupation of a house with a lamp projecting from it over the public thoroughfare, which would do no harm so long F as it was in good repair, but would become dangerous if allowed to get out of repair. It is therefore not a nuisance of itself. But if the defendant knowingly maintained it in a dangerous state he would then be indictable for the nuisance. This much is clearly decided by *R.* v. *Watson* (1). . . .

That statement would be true without the word "knowingly." *R.* v. *Watson* (1) is certainly not an authority for requiring the insertion of G the word "knowingly." BLACKBURN, J., continued, at p. 319 :

> This much is clearly decided by *R.* v. *Watson* (1), for the defendant was there held liable for not repairing his house which was on a highway and was ruinous and like to fall down, on the ground that as occupier he was bound to keep the house so as not to be a nuisance. As I have said, I do not wish to decide more than is necessary ; and if there were a latent defect in the premises, or something done to H them without the knowledge of the owner or occupier by a wrongdoer, such as digging out the coals underneath and so leaving a house near the highway in a dangerous condition, I doubt—at all events, I do not say—whether or not the occupier would be liable [foreshadowing the decision in *Barker* v. *Herbert* (11)]. But if he did know of the defect, and neglected to put the premises in order, he would be liable.

That, of course, is referring to the kind of defect which he has just mentioned—namely, a latent defect, or a defect due to somebody else's action. BLACKBURN, J., continues, at p. 319:

> He would be responsible to this extent, that as soon as he knew of the danger he would be bound to put the premises in repair or pull them down. So also the occupier would be bound to know that things like this lamp will ultimately get out of order, and, as occupier, there would be a duty cast upon him from time to time A to investigate the state of the lamp. If he did investigate, and there were a latent defect which he could not discover, I doubt whether he would be liable; but if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered, then I think he would clearly be answerable for the consequences. Now in the present case there is ample evidence that in August the defendant was aware that the lamp might be getting out of repair, and, it being his duty to put it in repair, he employs Chappell to do so. We must B assume, I think, that Chappell was a proper person to employ; and I may observe that he was clearly not the defendant's servant, as the jury say, but an independent contractor. But it was the defendant's duty to make the lamp reasonably safe, the contractor failed to do that; and the defendant, having the duty, has trusted the fulfilment of that duty to another who has not done it. Therefore the defendant has not done his duty, and he is liable to the plaintiff for the consequences. It was his duty to have the lamp set right; it was not set right.

C Why was it "the defendant's duty to make the lamp safe"? BLACKBURN, J., does not say it was his duty because he was aware that the lamp might be getting out of repair, but merely "it being his duty to put it in repair." Surely it was not his duty because he gave his mind to the question of the safety of his premises, and, wishing to ensure D that safety, employed a contractor to examine them and do all that might be necessary. He could not be in a worse position than if he had not given the matter a thought, and, therefore, had not had anyone to examine the premises and do what was necessary. The judge must have meant that he was under a duty because, as an occupier, he was bound to keep E his premises, including the lamp, from becoming unsafe for want of proper repair. That duty was not performed, and, therefore, he was liable, despite the absence of negligence or knowledge. The judge contrasted the position of a nuisance due to want of repair with that of a nuisance due to a latent defect or an act of trespass. LUSH and QUAIN, JJ., F rested their judgments on an absolute obligation to prevent one's property from becoming a nuisance. There is no question about that.

In POLLOCK ON TORTS, 14th Edn., p. 417, there is an interesting note on *Tarry* v. *Ashton* (10). We are told in the preface that the late Sir Frederick Pollock had collected many notes for his next revision. G The footnote by the editor is as follows:

> On the modern view, *Tarry* v. *Ashton* (10) is properly treated as a case of nuisance . . . Pollock's note proceeded: "The decision is right because there was no evidence that the defendant knew of the danger."

The editor then adds that this would be more accurately expressed "that the defendant knew or ought to have known of the danger." H The note by Sir Frederick Pollock continues as follows:

> I fail to see any real difference of opinion among the judgments in *Tarry* v. *Ashton* (10). LUSH and QUAIN, JJ., were not considering the possibility of a latent defect.

We have there an opinion of great value that all the three judges in *Tarry* v. *Ashton* (10) decided that there was an absolute duty upon the occupier of premises adjoining the highway to keep them in sufficient repair to prevent their becoming a danger. Blackburn, J., further drew the distinction between want of repair and act of trespass or latent defect.

The next case was *Nelson* v. *Liverpool Brewery Co.* (12). That was an action against owners who had let a house to a tenant with no agreement on either side as to the repair of the main walls, roof and main timbers. Owing to want of repair, a chimney-pot fell and injured the plaintiff, a servant of the tenants, and it was held that the plaintiff was not entitled to recover against the owners, although they had ample notice of the want of repair. I refer to the case because of the following passage. The judgment of the court, which consisted of Denman and Lopes, JJ., was delivered by Lopes, J., who said, at p. 313:

> We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier and the occupier alone being *prima facie* liable: first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition.

In the first case there mentioned, there is no suggestion at all of the necessity of proving knowledge, or means of knowledge, on the part of the landlord.

The next case was *Harrold* v. *Watney* (13), where a fence round the defendant's land adjoining the highway was in want of repair, and a child of 4 climbed on to it and fell. The fence was found to be defective. There was no finding that the owner knew, or ought to have known, of the defective condition of the fence. It was found to be a nuisance. The judgment in the court of first instance, I think, had been given for the defendant. The plaintiff appealed and succeeded. There was no suggestion there from first to last that the defendant's knowledge had any relevance whatever to the question of his liability. The whole discussion was on whether or not the duty to maintain the fence in a safe condition extended to making it safe even if children climbed upon it for the purpose of looking over it. There was no suggestion whatever of the necessity of proving knowledge.

In Salmond on Torts, 9th Edn., there is an interesting little note on this case, at p. 512:

> The occupier is liable of course for wilful or negligent acts of misfeasance whereby he obstructs the highway or renders it dangerous, and he is also liable for maintaining his adjoining premises in such a dangerous condition as to constitute a nuisance to the highway.

He cites *Harrold* v. *Watney* (13). There, again, there is no suggestion that knowledge, or means of knowledge, has any relevance.

The next case, *Palmer* v. *Bateman* (14), was an Irish case, and I think is the only case inconsistent with the view the court holds. The plaintiff was injured by a piece of the gutter from the roof of the defendant's house falling on her as she was passing along the street. The action was against the occupier for damages, and it failed. It was based on negligence, and negligence was negatived by the jury. On appeal, it was sought to rest on nuisance, and reliance was placed upon *Tarry* v. *Ashton* (10). The effect of *Tarry* v. *Ashton* (10) was completely misrepresented by counsel, who said that Blackburn, J., based his judgment on the defendant's knowledge of the nuisance, and that this view was not dissented from by the other judges. Lord O'Brien L.C.J. said, at p. 399:

> The point decided in [*Tarry* v. *Ashton* (10)] was that the owner of a house which, to his knowledge, was in a dangerous condition, could not free himself from responsibility by employing a contractor who was apparently competent, but failed to put things right.

It was actually said by Wright, J., that the judgment of all three members of the court was that the defendant with knowledge of the defect could not escape liability by shifting the responsibility on to the shoulders of the contractor. Such a misrepresentation of what was said and decided in *Tarry* v. *Ashton* (10) must tend to reduce the value—in English courts, at any rate—of the decision in *Palmer* v. *Bateman* (14).

The next case referred to was *Barker* v. *Herbert* (11). The defendant was the owner in possession of an empty house in a street with an area adjoining the highway. Some boys broke away a part of the railings guarding the area, with the result that the plaintiff, a child, fell into the area. He sued the owner for damages. The jury found that the area was, at the time of the accident, a nuisance, but that the defendant did not know that the rail had been moved, and that sufficient time had not elapsed to enable him to have known of it if he had used reasonable care. Judgment was given for the defendant. The plaintiff appealed. It was contended on behalf of the plaintiff that the defendant's duty to have his premises safe was absolute and without any limitation. It would have been quite easy for the court to say, if they had so thought, that an occupier of premises could never be liable for the premises becoming a nuisance without proof of knowledge, or means of knowledge. However, all that was decided, in very carefully chosen language, was that he was not liable if the dangerous state of the premises was due to the act of a trespasser, and not to any default of the occupier, or those for whom he was responsible, unless he neglected to abate the danger for an undue time after he became, or ought to have become, aware of it. Vaughan Williams, L.J., at p. 637, recognised the duty of a person, where premises abut on the highway, to maintain them in such a condition as not to constitute a danger or nuisance. Fletcher Moulton, L.J., said, at p. 642:

> The possessor of land adjoining a highway may not cause his premises to be a nuisance. . . .

It is clear, I think, that the word "cause" as there used should be read as "cause or by breach of duty permit." Fletcher Moulton, L.J., continued, at p. 642:

> In a case where the nuisance is created by the act of a trespasser, it is done

> without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance. . . .

He then went on to deal with a continuance of the nuisance when the occupier knows, or ought to know, of it. FARWELL, L.J., dealing with the contention that an occupier is under an absolute obligation at all times and in all circumstances to prevent a nuisance, said that a land- A owner was not liable for a nuisance caused, not by his own action, but by something done by another person against his will. I think it is clear that by the words "own action" FARWELL, L.J., must have meant "own action or default." He refers to *Tarry* v. *Ashton* (10), saying—as I think, inaccurately—that BLACKBURN, J., based his judgment on B knowledge by the defendant that the lamp was out of repair. For all that, however, it seems to me that the decision in *Barker* v. *Herbert* (11) was in complete harmony with the views of BLACKBURN, J. If the nuisance is due to the occupier's failure to keep in repair, there is liability. If it is due to the act of a trespasser, there is no liability without proof C of subsequent culpable neglect.

In *Pritchard* v. *Peto* (15), the plaintiff went to a house owned and occupied by the defendant to collect money due. While he was standing on the doorstep, a piece of cornice fell from the house on to his head. It was found that the defendant did not know of the defect, nor ought to D have known of it. It was due to decay. The defendant was held not liable. In the course of his judgment, BAILHACHE, J., said that in *Tarry* v. *Ashton* (10) the court held that it was the defendant's duty to make the lamp reasonably safe, and that he had not done his duty and was liable for the consequences. It was a nuisance case. BAILHACHE, J., E held in the case before him that the plaintiff was in the position of an invitee, and that the duty was only the same as that owed to the plaintiff in *Indermaur* v. *Dames* (16), which was to take reasonable care to keep one's house in such a state of repair as not to expose the plaintiff to any hidden danger of which she was aware, or ought to have been aware. He F added these important words, at p. 176:

> . . . quite a different duty from that owed by the defendant to the plaintiff in *Tarry* v. *Ashton* (10).

In *Noble* v. *Harrison* (17), a branch of a tree growing on the defendant's land overhanging the highway 30 ft. above the ground broke and fell G upon the plaintiff's motor coach. The plaintiff claimed damages, but failed, because the fracture was due to a latent defect which was not discoverable by any reasonably careful inspection, and which was, of course, unknown to the defendant. The claim was based on nuisance. The county court judge had found for the plaintiff. The Divisional H Court reversed the decision. ROWLATT, J., said, at p. 338:

> The result of [the cases] is that a person is liable for a nuisance constituted by the state of his property: (1.) if he causes it; (2.) if, by the neglect of some duty, he allowed it to arise; and (3.) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it.

He distinguished *Tarry* v. *Ashton* (10) by saying that in that case there was an absolute duty to maintain the lamp safely, but that there was no such duty with regard to a tree. In our opinion, this is a correct statement of the law.

In the present case, the defendant was under a duty to repair. Owing to neglect of that duty, the defendant allowed his house to become a nuisance, and therefore the defendant is liable. WRIGHT, J., as he then was, agreed. In dealing with *Tarry* v. *Ashton* (10), he was, I venture to think, clearly mistaken in saying that the plaintiff was entitled to judgment on the ground of negligence because the defect was not observed owing to the negligence of the defendant's servant employed to inspect it. Negligence was in fact negatived, and BLACKBURN, J., in terms said that the person employed was not a servant but a contractor. The judge went on to say, however, that LUSH and QUAIN, JJ., had held that there was an absolute duty to keep the lamp in repair, and that BLACKBURN, J., thought that for a latent defect the occupier would not be liable. Adopting that view, confirmed by the principle laid down in *Barker* v. *Herbert* (11), he held that the defect in the branch was clearly latent, and that the defendant was, therefore, not liable, in the absence of knowledge, or means of knowledge.

Much reliance was placed upon *St. Anne's Well Brewery Co.* v. *Roberts* (18) by the appellant. The defendants were the owners, but not the occupiers, of part of the old city wall at Exeter, which fell on the plaintiff's inn. When they let the property, there was no reason to suppose that it was unsafe—I think the wall had been there for some hundreds of years—or that by any reasonable diligence the defendants could have ascertained that it was unsafe. They had not undertaken any obligation to repair. It was held by the Court of Appeal, overruling ACTON, J., that the plaintiffs had failed to bring their case within the principles of *Todd* v. *Flight* (7), and that there was no liability. SCRUTTON, L.J., agreed that the wall was a nuisance, but went on to ask who the occupier was. After saying that the defendants were not the occupiers, he said, at p. 7:

> I think also it is clear law that the person liable for nuisance on premises is the occupier.

Then follows the passage—only *obiter*—which has been relied upon so strongly by the appellant:

> I think it has been established by authority binding on this court—I refer to *Barker* v. *Herbert* (11), which has been followed in other cases—that the occupier himself is not liable if he did not create the nuisance on the land which he occupies unless, perhaps not even then knowing of the nuisance or being in such a position that he ought with reasonable care to have known of the nuisance, he allows it to continue . . . if Wilson [the occupier] had been sued for nuisance, I think the question to be determined in his case would have been : Did you know that there was a nuisance ? Ought you, with the exercise of reasonable care, to have known there was a nuisance ? And if both these questions were answered in the negative, there would have been no liability on the occupier.

This passage, based as it is on *Barker* v. *Herbert* (11), must, we think, be interpreted with reference to the facts of the case then before the court. The plaintiff's house came right up to the wall, and the plaintiff or his predecessors had excavated out of the city wall recesses for use as cupboards. It was found that that was partly responsible for the collapse, and that the other contributing cause was a gradual washing away of the soil under the foundations. The fall was due, to quote SCRUTTON, L.J., at p. 5:

> to as latent a defect as you could expect any defect to be.

There was no want of repair of the wall itself, except to put right the excavations made either by the plaintiff himself or by his predecessors, and the case was typical of that contemplated by BLACKBURN, J., in *Tarry* v. *Ashton* (10) and by the court in *Barker* v. *Herbert* (11). It was a nuisance due partly to the acts of a trespasser and partly to a latent defect under the foundations, and not to any want of repair. We are satisfied that SCRUTTON, L.J., was thinking only of the case with which he was dealing, and had no intention of laying down anything inconsistent with *Tarry* v. *Ashton* (10) and other cases dealing with nuisance due to want of repair.

In our view, the opinion expressed by GODDARD, J., in *Wilchick* v. *Marks & Silverstone* (19) is not accurate. It was unnecessary for the decision of the case before him, but, at p. 66, he said this, and again this passage—naturally enough, of course—was relied on by the appellant in the case before us. He referred to *Payne* v. *Rogers* (5), and said that that case had been approved in *R.* v. *Pedly* (20), *Todd* v. *Flight* (7), *Pretty* v. *Bickmore* (8) and *Nelson* v. *Liverpool Brewery Co.* (12), and that those cases established that, where a landlord has assumed an obligation to repair, he is liable to a person injured through disrepair, though to that must now be added that the plaintiff must prove that he had knowledge of the state of disrepair. The judge relied upon *Morgan* v. *Liverpool Corpn.* (21) and *St. Anne's Well Brewery Co.* v. *Roberts* (18). That statement of law, in our view, is not in accordance with *Tarry* v. *Ashton* (10) and the other cases to which I have referred. *Morgan* v. *Liverpool Corpn.* (21) was a case between tenant and landlord. It was based on breach of duty to repair, and it was held, in very carefully chosen language, that, as between the tenant and the landlord, the landlord was entitled to notice from the tenant of the disrepair complained of before he could be sued for breach of duty. That case has no bearing on the question between occupiers and owners who are under an obligation to repair and the public. I have already expressed the view that the passage in the judgment of SCRUTTON, L.J., in the other case relied upon—the *St. Anne's Well Brewery Co.* case (18)—had no reference to cases of nuisance owing to want of repair.

There is only one other case to which I ought to refer, and that is the Irish case of *Mullan* v. *Forrester* (22). The defendants were the owners of a dye-works in Belfast. In 1910, the works were closed down,

and nothing in the way of repair was thereafter done. In 1920, notices
were served on the defendants to take down such portions of the building
as were dangerous. In consequence of such notices, the defendants took
down the roof and the walls other than the street wall. This wall was
then left without any support. It had lost the support it got from being
A bonded into the side walls and from the roof. In a storm, it fell and killed
three people, and the action was for damages under Lord Campbell's Act.
The jury negatived negligence, and, although nuisance had been pleaded,
the trial judge refused to put to the jury the question whether the wall
was a nuisance, and gave judgment for the defendants. The plaintiffs
B applied to the Court of Appeal for a new trial, on the ground that, if the
wall was a nuisance, they were entitled to judgment although the jury
had found that the defendants did not know, or ought to have known,
that it was dangerous. A new trial was ordered, Moore, J., dissenting.
Pim, J., expressed the opinion that the evidence was altogether in favour
C of the view that the wall became a nuisance from the time the roof and
side walls were removed (acts done by the defendants), and that the
defendants' knowledge of the danger was immaterial. It would seem
consistent with this view that a nuisance caused, not by a positive act,
but by neglecting to perform a positive duty, should impose a similar
D liability without proof of knowledge or means of knowledge. Gordon,
J., took the same view. Indeed, he was prepared to enter judgment for the
plaintiffs on the ground that the evidence was conclusive that the wall
was made dangerous by the removal of the side walls and roof, and that
the defendants' knowledge was immaterial. Although *Barker* v.
E *Herbert* (11) was not cited, he pointed out that, if the wall became a
nuisance owing to the act of a third party, or to some event which no one
could foresee, knowledge would be material. Moore, J., dissented.
He thought that the findings of the jury cleared the defendants of having
done any act to cause the danger, that they were not, therefore, the authors
F or creators of the danger, and that they had not wrongfully suffered the
wall to continue in a dangerous condition. He considered the question of
the necessity of proving knowledge, and came to the conclusion that
Blackburn, J., had decided in *Tarry* v. *Ashton* (10) that, where the
defendant is sued as occupier of the land upon which a nuisance exists,
G and not as its original creator, if the subject-matter was not a nuisance
originally, he ought not to be made liable for it unless he had knowledge
and was in default. With the greatest respect to the judge, Blackburn, J.,
decided no such thing. Ashton had no knowledge, and had been cleared
of all negligence. He was liable because his duty to keep in repair had not
H in fact been performed. Moore, J., also thought that the defect in the
wall was latent. In our opinion, the view of the majority of the court was
in accord with the English cases. The principle laid down by the
majority of the court was that, if premises become dangerous as the
result of something done by an occupier, and cause damage, the occupier
is liable, although he did not know of the danger, and was not negligent

in not knowing. That principle is in harmony with the principle laid down in *Tarry* v. *Ashton* (10) that, if premises become dangerous as a result of failure to repair, and cause damage, the occupier is liable, although he did not know of the danger, and was not negligent in not knowing. Positive acts of neglect of duty are thus placed on the same footing. On the other hand, if premises become dangerous, not by the occupier's act, nor neglect of duty, but as the result of the act of a third party, or of a latent defect, the occupier is not liable without proof of knowledge or means of knowledge and failure to abate it. In our view, the appeal fails, and must be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Hyman Stone & Co.*, Sheffield (for the appellant); *Doyle, Devonshire & Co.*, agents for *Irwin Mitchell, Kershaw & Co.*, Sheffield (for the respondent).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

PIONEER LAUNDRY AND DRY CLEANERS, LTD. *v.* MINISTER OF NATIONAL REVENUE.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer), **July 11, 13, October 13, 1939.**]

Privy Council—Canada—Income tax—Allowances—Depreciation—General instructions governing allowances—Exercise of discretion—New company taking over business of company ceasing to exist—Income War Tax Act (*R.S.C.*, 1927, *c.* 97), *ss.* 3, 5 (*a*) (*b*), 58, 60, 63—*Customs and Inland Revenue Act*, 1878 (*c.* 15), *s.* 12.

The appellant company was incorporated in 1932. Upon its formation, it acquired the machinery and equipment of a company of the same name which had then gone into voluntary liquidation. The appellant company in its statutory return claimed an allowance in respect of depreciation of that machinery and equipment calculated in accordance with the rates stated in certain circulars issued by the respondent to local officers of the department, and the appellant company contended that these circulars were to be treated by the respondent as an exercise in its favour of his statutory discretion as to depreciation conferred upon him by the Canadian Income War Tax Act:—

HELD: (i) the taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based.

(ii) the decision of the Minister is not purely administrative and final, and a dissatisfied taxpayer has a right of appeal.

(iii) the court would not, however, interfere with the Minister's decision unless it were manifestly against sound and fundamental principles.

(iv) the reason given by the respondent for his decision was not a proper ground for the exercise of his discretion, and, in the absence of fraud or improper conduct, he was not entitled to disregard the separate legal existence of the appellant company, and to inquire as to who its shareholders were, and its relation to its predecessors.

[EDITORIAL NOTE. The principal question in the present appeal was whether the issue of general instructions governing depreciation allowances is, in effect, the exercise of a discretion given by Parliament to the revenue authorities. It is decided that it is not. An important question was argued, but had not to be decided, and this was whether a taxpayer who has already received in previous years allowances for depreciation amounting to 100 per cent. of the book value of the assets is entitled to any further allowance.

AS TO ALLOWANCES FOR DEPRECIATION, see HALSBURY, Hailsham Edn., Vol. 17, pp. 165-169, paras. 337-345; and FOR CASES, see DIGEST, Vol. 28, pp. 52-54, Nos. 266-276.]

Cases referred to:

(1) *Re Addie & Sons* (1875), 1 Tax Cas. 1; 28 Digest 48, case *246i.*

(2) *Forder* v. *Handyside* (1876), 1 Ex. D. 233; 28 Digest 52, *266*; 45 L.J.Q.B. 809; 35 L.T. 62; 1 Tax Cas. 65.

(3) *Hall (John) Junior & Co.* v. *Rickman*, [1906] 1 K.B. 311; 28 Digest 53, *267*; 75 L.J.K.B. 178; 94 L.T. 224.

APPEAL by special leave from a majority judgment of the Supreme Court of Canada (CROCKET, KERWIN and HUDSON, JJ., SIR LYMAN P. DUFF, C.J., and DAVIS, J., dissenting), dated Dec. 12, 1938, affirming a judgment of the Exchequer Court of Canada (ANGERS, J.), dated Nov. 4, 1937, which dismissed the appellants' appeal from the decision of the respondent whereby he refused the appellants' claim for an allowance for depreciation on machinery included in their income tax return for the year ending Mar. 31, 1933. The judgment of their Lordships was delivered by LORD THANKERTON.

Martin Griffin, K.C., for the appellants.

F. P. Varcoe, K.C., and *Frank Gahan* for the respondent.

Griffin, K.C.: The machinery in question had been owned by a company which went into liquidation. The judgment of the Supreme Court is erroneous in deciding that it was the intention of the Canadian Parliament that there should be no depreciation allowance unless the Minister granted one, and that the Minister, in deciding whether or not to grant a depreciation allowance, was to be entitled to look beyond the established facts of ownership. The Canadian Income War Tax Act defines and limits the field within which the Minister's discretion must be exercised with regard to depreciation. There is no Canadian authority on the question whether purchasers of secondhand property are entitled to deduct depreciation if their vendor has been allowed it in full. ANGERS, J., found every fact entitling the appellants to judgment, and yet gave judgment against the appellants. The appellants rest their case on the dissenting judgment of SIR LYMAN P. DUFF, C.J., and DAVIS, J.

Varcoe, K.C.: Depreciation has been described as expired capital outlay. A prudent business, although not obliged to do so, reserves out of its profits sufficient to make good that capital waste. The object of depreciation allowance is to secure the investment of the shareholders. The Customs and Inland Revenue Act, 1878, s. 12, contains provision respecting depreciation. The discretion of the commissioners under this

Act in respect of depreciation is narrower than that contained in the Canadian Act. Deductions beyond 100 per cent. are not reasonable in the case of a continuing company. This company, which had no new shareholders in it, had the shareholders' interest in respect of capital fully protected, and 100 per cent. depreciation had been allowed by the Minister. The new company's shareholders, which are the same, cannot seek further depreciation allowance by the Minister. If the Minister would have been right in refusing further relief to the old company, he was not guilty of any impropriety in refusing relief to the new company, which had merely duplicated the old company. [Counsel referred to *Re Addie & Sons* (1), *Forder* v. *Handyside* (2) and *Hall* (*John*) *Junior & Co.* v. *Rickman* (3).]

Gahan followed on the same side.

Griffin, K.C., was not called upon in reply.

Lord Thankerton : The question in this appeal relates to the disallowance by the respondent of certain allowances for depreciation claimed by the appellants. In the return filed by the appellants in July, 1933, in compliance with the Income War Tax Act (R.S.C., 1927, c. 97), s. 33, for the fiscal year ending Mar. 31, 1933, the appellants disclosed gross earnings of $171,122.04, and claimed various deductions including allowances for depreciation as follows :

Depreciation :—	*Per cent.*	$
Machinery and Equipment ..	10	14,131.15
Automobiles	20	2,935.08
Horses	10	135.25
Furniture and Fixtures ..	10	574.07
		$17,775.55

On Feb. 19, the Income Tax Commissioner sent to the appellants a notice of assessment, in which the appellants' claim in respect of depreciation was disallowed except to the extent of $255.08 under the second item, in respect of two coupés and a truck body, which will be referred to later.

The appellants appealed to the respondent under sect. 58 of the Act, but the appeal was dismissed by the respondent, and, the appellants having filed a notice of dissatisfaction under sect. 60, the respondent transmitted the papers to the Exchequer Court in terms of sect. 63. Pleadings were ordered and filed, and, after trial, the appeal was dismissed by the Exchequer Court (Angers, J.) on Nov. 4, 1937. On appeal to the Supreme Court of Canada, the case was heard before Sir Lyman P. Duff, C.J., Crocket, Davis, Kerwin and Hudson, JJ., and on Dec. 12, 1938, the court dismissed the appeal, Sir Lyman P. Duff, C.J., and Davis, J., dissenting.

The relevant facts may be summarised as follows. The appellant company was incorporated on Mar. 23, 1932, and it acquired the machinery and equipment, etc., in respect of which the claim for depreciation has been disallowed, from a company called the Home Service Co., Ltd.,

at a price fixed by independent appraisal. The correctness of this valuation has not been challenged by the respondent. The three items in respect of which the claim was admitted were acquired from other sources. Home Service Co., Ltd., was incorporated also on Mar. 23, 1932, and on Apr. 1, 1932, it acquired all the physical assets of seven com-
A panies, including the original Pioneer Laundry and Dry Cleaners, Ltd., which had gone into voluntary liquidation on Mar. 30, 1932. The machinery and equipment, etc., here in question were among the assets acquired by Home Service Co., Ltd., from the original Pioneer Laundry and Dry Cleaners, Ltd.

B At this time, all the outstanding share capital of the seven companies above referred to was owned directly or through nominees by a company called Pioneer Investment Co., Ltd., the assets of which were also acquired by Home Service Co., Ltd., with the exception of (*a*) shares owned by the former company—*i.e.*, the shares of the seven subsidiaries,
C which, by reason of the liquidation, became unsaleable—and (*b*) amounts owing to the former company by its shareholders. Pioneer Investment Co., Ltd., went into voluntary liquidation on Apr. 7, 1932. The machinery and equipment, etc., here in question were fully written off by depreciation while they were in the ownership of the original Pioneer Laundry
D and Dry Cleaners, Ltd.

All the share capital of Home Service Co., Ltd., except 40 shares out of 10,000 shares of par value of $100 each, was issued or sold to the liquidators of the operating subsidiary companies of Pioneer Investment Co., Ltd., in consideration of the transfer of the assets of the operating
E companies to Home Service Co., Ltd. On the winding up of the operating companies, these shares were distributed to the parent company, Pioneer Investment Co., Ltd., and, on the winding up of that company, were distributed to its own shareholders, with the admitted result that the shareholders of Home Service Co., Ltd., are the same as were the share-
F holders of Pioneer Investment Co., Ltd., and their respective holdings in the new company are the same, or substantially the same, as were their respective holdings in the old company. The 40 shares referred to were allotted to Pioneer Investment Co., Ltd., in part-payment of the assets acquired from that company.

G It is further agreed that during the fiscal year ended Mar. 31, 1933, the shareholders of the appellant company were as follow:

	Shares.
Home Service Co., Ltd.	97
Charles H. Wilson	1
Mary E. Stewart	1
H Thomas H. Kirk	1
	100

It is also agreed that the three persons named were during such fiscal year shareholders of the Home Service Co., Ltd.

The amount of depreciation claimed by the appellant company in their statutory return was in conformity with the rates stated in certain circulars issued by the respondent to local officers of the department, and the appellants sought, because of their being made available to the public, to have them treated as an exercise by the respondent of his statutory discretion as to depreciation. Their Lordships agree with the view of CROCKET and HUDSON, JJ., that these departmental circulars A are for the general guidance of the officers, and cannot be regarded as the exercise of his statutory discretion by the respondent in any particular case. The other judges of the Supreme Court express no opinion on this point. The trial judge had expressed a contrary view.

The main question in the appeal relates to the discretion conferred on B the respondent as to allowances for depreciation by the Income War Tax Act (R.S.C., 1927, c. 97), ss. 3, 5, 6, the material provisions of which are as follow:

> 3. For the purposes of this Act, " income " means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary C or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be, whether derived from sources within Canada or elsewhere. . . .
>
> 5. " Income " as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions: (*a*) such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in deter- D mining the income derived from mining, and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair. . . .
>
> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of . . . (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act. . . E

In the first place, as to the nature of the discretion thus conferred on the Minister, CROCKET and HUDSON, JJ., state:

> Reading these sections by themselves, and without reference to any outside authorities, it would seem fairly plain that it was the intention of Parliament that there should be no depreciation allowance unless the Minister, in his sole discretion, decided that there should be. There is nothing anywhere to indicate the principle F or basis on which the depreciation allowance is to be ascertained. It might vary according to different accounting methods, different economic theories, different general business conditions in the country. Nor is there anything in the statute which denies a right in the Minister to look beyond the legal façade for the purpose of ascertaining the realities of ownership or the possibilities of schemes to avoid taxation, and it would seem to me that it was the intention of Parliament that the Minister, and he alone, could properly estimate these different factors.
>
> The authorities cited on behalf of the appellants are mostly of statutes somewhat G differently worded from ours, and in effect hold no more than that, where the statute gives a discretion to administrative officers, and provides an area in time or space for the exercise of such discretion, the commissioners must take that into account. In the present case, the Minister has exercised his discretion, and, as already stated, the statute does not define or limit the field for operation of such discretion.

A similar opinion was expressed by KERWIN, J. Their Lordships are H unable to agree with these views, and they agree with the opinion of DAVIS, J., in which SIR LYMAN P. DUFF, C.J., concurred, and in which he states:

> The appellants were entitled to an exemption or deduction in " such reasonable amount as the Minister in his discretion, may allow for depreciation." That

involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles.

In their Lordships' opinion, the taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based. The Minister has a duty to fix a A reasonable amount in respect of that allowance, and, so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer. It is equally clear, however, that the court would not interfere with the decision, unless, as DAVIS, J., states, "it was manifestly against sound and fundamental B principles."

The decision of the Income Tax Commissioner in the present case, which is accepted by the respondent as his statutory decision, makes clear the point of principle which the appellants claim to have been thereby contravened. It is as follows:

> C The Hon. the Minister of National Revenue, having duly considered the facts as set forth in the notice of appeal and matters thereto relating, hereby affirms the said assessment on the ground that, while the company was incorporated and commenced operations during 1932, there was no actual change in ownership of the assets purchased or taken over from Pioneer Investment Co., Ltd., by Home Service Co., Ltd. (of which the taxpayer is a subsidiary), and set up in the books of the taxpayer at appreciated values, that, in the exercise of the statutory discretion, D a reasonable amount has been allowed for depreciation, and that the assessment is properly levied under the provisions of the Income War Tax Act.

Their Lordships agree with SIR LYMAN P. DUFF, C.J., and DAVIS, J., that the reason given for the decision was not a proper ground for the exercise of the Minister's discretion, and that he was not entitled, in the E absence of fraud or improper conduct, to disregard the separate legal existence of the appellant company and to inquire as to who its shareholders were and its relation to its predecessors. The taxpayer is the company, and not its shareholders. Their Lordships agree with the reasons given by these judges, and their application of the authorities F cited by them, and it is unnecessary to repeat them. It follows that the assessment should be set aside, and the matter should be referred back to the respondent. It becomes unnecessary to consider a further question which was debated—namely, as to whether or not a taxpayer who has already received in previous tax years allowance for depreciation G amounting to 100 per cent. of the book value of the assets is entitled to any further allowances. Their Lordships will therefore humbly advise His Majesty that the decisions appealed from should be set aside, and that the assessment should be set aside and the matter referred back to the Minister. The appellants will have the costs of this appeal and the H costs in the courts below.

Appeal allowed with costs.

Solicitors: *William A. Crump & Son* (for the appellants); *Charles Russell & Co.* (for the respondent).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

EAVES, *Re.* ([1939] 4 All E.R. 260; 162 L.T. 8). *Distinguished. Re* DEWHIRST [1948] 1 All E.R. 147

. EAVES.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **October 19, 20, 23, November 13, 1939.]**

Mistake—Determination of gift on marriage—Marriage annulled on ground of husband's incapacity—Wife waiting 12 years before taking proceedings—Acquiescence—Loss of right to restitution.

Will—Construction—Gift during widowhood—Decree of nullity in respect of second marriage—Whether gift restored.

By his will, the testator, who died in Dec., 1919, gave his wife, *inter alia,* "during her life and widowhood," the use of his house for the unexpired residue of the term for which it was held. In 1925, by agreement between the wife and the testator's son, who were both the trustees of the will and the principal beneficiaries thereunder, the house was sold and the proceeds invested. On Sept. 24, 1925, the widow remarried and the investments were thereupon transferred to the son (the latter being entitled to them under the will upon the determination of the widow's interest), who converted them to his own use. On May 24, 1937, a decree *nisi* of nullity was pronounced of the widow's marriage in 1925 on her own petition alleging the husband's incapacity, and this was duly made absolute. The widow contended that her life interest in the house had not determined in 1925, and claimed the appropriate relief :—

HELD : (i) the appellant's widowhood determined on her re-marriage.

(ii) the transfer was made, not under a mistake of fact, but under a composite mistake, partly of fact and partly of intention.

(iii) the fact that the fund was transferred by agreement, in contemplation of the re-marriage, and not after the ceremony, made no difference.

(iv) the claim could not be treated as one for money had and received. The fund had ceased to exist as a trust fund, and had been handed over to the defendant on a condition which had been fulfilled, and, if a party so acted that the fair inference to be drawn from his conduct was that he consented to the transaction, he could not subsequently question the legality of the transaction.

Decision of FARWELL, J. ([1939] 3 All E.R. 500) *affirmed.*

[EDITORIAL NOTE. It will be noted that the Court of Appeal rest their decision mainly upon the plea of acquiescence, and that the plaintiff had been party to a transaction which could not be re-opened. GODDARD, L.J., expressly reserved the question whether a gift during widowhood is determined by a marriage which is subsequently annulled upon the ground of impotence, and it would appear that this question must be taken not to have been finally decided.

AS TO EFFECT OF NULLITY DECREE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640, 641, para. 937; and FOR CASES, see DIGEST, Vol. 27, pp. 265, 266, Nos. 2326-2345.]

Cases referred to :

(1) *Dodworth* v. *Dale*, [1936] 2 K.B. 503; [1936] 2 All E.R. 440; Digest Supp.; 105 L.J.K.B. 586; 155 L.T. 290; 20 Tax Cas. 285.

(2) *Cairncross* v. *Lorimer* (1860), 3 L.T. 130; 21 Digest 328, *1227*.

(3) *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1892), I.L.R. 20 Calc. 296; L.R. 19 Ind. App. 203; 21 Digest 300, case *1082 iv.*

(4) *A.* v. *A.* (*sued as B.*) (1887), 19 L.R.Ir. 403; 27 Digest 266, case *s.*

(5) *G.* v. *G.* (*falsely called K.*) (1908), 25 T.L.R. 328; 27 Digest 268, *2360*.

(6) *Re Wombwell's Settlement, Clerke* v. *Menzies*, [1922] 2 Ch. 298; 27 Digest 457, *4752*; 92 L.J.Ch. 18; 127 L.T. 295.

(7) *Turner* v. *Thompson* (1888), 13 P.D. 37; 11 Digest 332, *214*; 58 L.T. 387.

(8) *Smith* v. *Clay* (1767), Amb. 645; 20 Digest 524, *2490*.

(9) *Brooks* v. *Muckleston*, [1909] 2 Ch. 519 ; 20 Digest 525, *2497* ; 79 L.J.Ch. 12 ; 101 L.T. 343.

(10) *Newbould* v. *A.-G.*, [1931] P. 75 ; Digest Supp. ; 100 L.J.P. 54 ; 144 L.T. 728.

(11) *G.* v. *M.* (1885), 10 App. Cas. 171 ; 27 Digest 351, *3339* ; 53 L.T. 398.

(12) *Henry* v. *Hammond*, [1913] 2 K.B. 515 ; 32 Digest 504, *1649* ; 82 L.J.K.B.
A 575 ; 108 L.T. 729.

(13) *Fowke* v. *Fowke*, [1938] Ch. 774 ; [1938] 2 All E.R. 638 ; Digest Supp. ; 107 L.J.Ch. 350 ; 159 L.T.8.

(14) *Rogers* v. *Ingham* (1876), 3 Ch.D. 351 ; 35 Digest 93, *25* ; 35 L.T. 677.

(15) *Re Robinson, McLaren* v. *Public Trustee*, [1911] 1 Ch. 502 : 32 Digest 518, *1761* ; 80 L.J.Ch. 381 ; 104 L.T. 331.

B 16) *Baker* v. *Courage & Co.*, [1910] 1 K.B. 56 ; 32 Digest 337, *206* ; 79 L.J.K.B. 313 ; 101 L.T. 854.

(17) *Dunbar* v. *Dunbar*, [1909] 2 Ch. 639 ; 27 Digest 165, *1339* ; 79 L.J.Ch. 70 ; 101 L.T. 553.

APPEAL by the plaintiff from an order of FARWELL, J., dated June 29,
C 1939, and reported *sub nom. Eaves* v. *Eaves*, [1939] 3 All E.R. 500, where the facts are fully set out.

C. E. Harman, K.C., and *E. M. Winterbotham* (for *Gerald R. Upjohn*, on war service) for the appellant.

W. P. Spens, K.C., and *F. Baden Fuller* for the respondent.

D *Harman, K.C.:* It was said by FARWELL, J., that the claim could not succeed because, having waited so long, the appellant was not now entitled to the money. The defence of delay was not pleaded, and the point was not taken in argument. Before a decree of nullity can be obtained, the court must be satisfied that the petitioner has not been
E guilty of unreasonable delay. The court has granted a decree, and must, therefore, be taken to have considered the matter. On the pleadings, no plea of laches, acquiescence or delay is open to the respondent. In *Re Wombwell's Settlement, Clerke* v. *Menzies* (6), a father was held to be absolutely entitled to funds settled upon his daughter on her marriage,
F upon that marriage being declared null and void. [CLAUSON, L.J., referred to the citation from *Smith* v. *Clay* (8) in *Brooks* v. *Muckleston* (9).] *Harman, K.C.*, continuing : Mere delay is not a bar, although laches or acquiescence may be. The two parties are not, and never have been, husband and wife, a decree of nullity having been pronounced. There
G was no less of the status of widowhood. There never was a valid marriage, and, therefore, Mrs. Eaves did not lose the status of a widow, or, if she lost it for a time, she regained it. The words of the will are "during life and widowhood." The appellant is alive, and is a widow, and, therefore, it cannot be said that her interest came to an end. It
H is said on behalf of the respondent that the matter is a concluded transaction. It cannot, however, be a concluded transaction so long as the appellant is alive and is the testator's widow. The reasoning of LAWRENCE, J., in *Dodworth* v. *Dale* (1) could apply to that time only when she had another status. If the trust fund were intact, there is no doubt that the appellant would be entitled to the income from the

time she recovered her status of widowhood. It was due to a misapprehension that she said that the trust was at an end. With regard to acquiescence, if time ran at all, it would commence to run only from the date the right of action accrued. As regards delay, it was never pleaded. Delay alone, however, is never an answer. [Counsel referred to *Newbould* v. *A.-G.* (10), *G.* v. *M.* (11), *Henry* v. *Hammond* (12), A *Fowke* v. *Fowke* (13), *Rogers* v. *Ingham* (14), *Re Robinson, McLaren* v. *Public Trustee* (15) and *Baker* v. *Courage & Co.* (16).]

Spens, K.C.: The present case is entirely different from *Re Wombwell's Settlement, Clerke* v. *Menzies* (6). In the present case, the fund was settled on the second wife during life and widowhood, and, subject B to that, it went to the son absolutely. The event happened which vested the absolute interest in the son. The marriage of the appellant was valid at the time it took place, and it brought her widowhood to an end. Therefore, the fund vested in the son, and there is a concluded transaction. The whole transaction is completed on the basis of the C legal rights existing after the second marriage took place. The cases are summarised in *Dodworth* v. *Dale* (1). Things which have been done during a marriage cannot be re-opened because the marriage has been declared null and void. In the present case, there are two individuals, both of whom are trustees and both of whom are beneficiaries. They D have wound up the trust. At the time when that was done, no one could say that there was not a valid marriage. In the present case, the payment was not made under a mistake of fact. *Turner* v. *Thompson* (7) shows that a marriage voidable upon the grounds on which the marriage in the present case was annulled makes the lady E a wife both *de facto* and *de jure* while the marriage subsists. [Counsel referred to *G.* v. *M.* (11), *Fowke* v. *Fowke* (13) and *Dunbar* v. *Dunbar* (17).]

SIR WILFRID GREENE, M.R.: The grounds upon which, in my opinion, this appeal ought to be dismissed are as follow. F

(1) When the appellant went through the ceremony of marriage with Mr. Powell in 1925, the respondent would have been entitled to call for the transfer of the trust fund to himself, upon the ground that, as the result of the ceremony, the appellant's widowhood stood determined. If the appellant had declined to consent to the transfer, the G respondent could have obtained an order of the court for the purpose. The appellant could not have been heard to say that she was entitled to have the transfer postponed in order to see (*a*) whether or not facts would appear which would entitle her to obtain a decree of nullity, and, if so, (*b*) whether or not she would decide to apply for such a decree. H

(2) If an order of the court had been made directing a transfer of the fund to the respondent, it would have been impossible for the appellant to make the present claim. The transaction would have been one properly completed at a time when the marriage was a valid marriage, and it is well settled that such transactions cannot be reopened, not-

withstanding the language in which the form of nullity decree in use is couched.

(3) If, instead of obtaining an order of the court, the transfer had been made after the ceremony by agreement, the same result would have followed—namely, the transaction could not have been re-opened.
A To hold otherwise would mean that no one could safely act in any case of an interest determinable on widowhood without obtaining the protection of an order of the court.

(4) In the present case, the transfer was made and the trust wound up by agreement in contemplation of what in fact took place—namely,
B the remarriage of the appellant—and not after the ceremony, but this makes no difference.

(5) The argument that the transfer can be set aside upon the ground that it was made under a mistake of fact does not bear examination. The transfer took place upon the footing that a marriage was about to
C take place which would give to the appellant the status of a married woman, which it in fact did. If, however, it be assumed that the understanding was that the marriage would not be annulled (an assumption which I am not prepared to make), the mistake would not have been a mistake of fact. It would have been, so to speak, a composite mistake,
D partly of fact and partly of intention—of fact in so far as it concerned the matters which gave rise to the right to have the marriage annulled, of intention in so far as the exercise of an option by the appellant was required before annulment could take place.

(6) There is no foundation for the suggestion that the claim can be
E treated as one for money had and received, or as analogous thereto.

CLAUSON, L.J.: In 1925, a sum of 5 per cent. war stock stood in the names of the plaintiff and defendant, as trustees of the will of the plaintiff's deceased husband. The income of the fund was, by reason
F of the terms of the will, payable to the plaintiff during her life and widowhood. Subject to that interest of the plaintiff, the fund belonged beneficially to the defendant, her step-son. In 1925, the plaintiff was minded to remarry, and appreciated that her interest in the fund would terminate with her widowhood. The plaintiff and the defendant arranged
G to wind up the trust by selling the stock, and the proceeds were, as part of the arrangement, received by the defendant, he paying to the plaintiff interest up to the actual day of her remarriage, which took place on Sept. 24, 1925. The defendant paid into his bank the proceeds so received, and they in fact seem to have gone to reduce his overdraft.
H At all events, he took and used the proceeds as his own, in precise accordance with the intentions of himself and of the plaintiff.

Twelve years passed, and on Nov. 15, 1937, a decree absolute was pronounced annulling the plaintiff's second marriage on the ground of the incapacity of the intended husband. The decree was in the usual form declaring the marriage to be, and to have been, absolutely null and void, and the plaintiff to have been, and to be, free from all bond of marriage with the intended husband.

Thereafter the plaintiff brought the present action claiming against the defendant replacement of the trust fund and payment of the income from the date of the annulled marriage, or, alternatively, from the date of the decree absolute of annulment. The judge has dismissed the action. He was not prepared to hold that the solemnisation of the marriage, which was subsequently annulled, of itself terminated the plaintiff's interest in the fund in question. On the contrary, he held that, after the decree, the widowhood of the plaintiff must be considered to subsist. He, however, held that the fact that, with the knowledge and consent of the plaintiff, the trust fund had ceased to exist as a trust fund, and had been handed over to the defendant, made the plaintiff's claim one which a court of equity would refuse, in the circumstances, to admit, and he accordingly dismissed the action. In my judgment, he could not, without infringing well-established principles, do otherwise than dismiss the action. In the first place, it is well settled that, until the decree absolute, the two parties to the marriage have the status of married people—a status which must be treated as continuing during the period that the marriage remains unannulled—with the result that transactions which have been concluded, things which have been done, during that period on the footing of the existence of that status cannot be undone or reopened. It is unnecessary to set out the authorities on this point, since the whole matter is fully dealt with in the judgment of LAWRENCE, J., in *Dodworth* v. *Dale* (1) in terms with which I will venture to express my complete agreement. The material transaction in the present case was the handing over of the fund to the defendant as his own in anticipation that, on Sept. 24, 1925, the lady would acquire the status of a married woman. On Sept. 24, 1925, she acquired that status, and the transaction then became complete and effectual, and could not have been questioned in any court at any time before the decree of annulment, and the annulment cannot have the effect of undoing or reopening such a transaction. This ground alone suffices to justify the dismissal of the present action.

There is, however, a further ground which would, in my view, support the dismissal of the action. It is well settled that, if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal: *Cairncross* v. *Lorimer* (2). The principle applies even if the party whose conduct is in question was himself acting without full knowledge or in error: *Sarat Chunder Dey* v. *Gopal Chunder Laha* (3). In the circumstances of the present case, the defendant was left by the plaintiff to act, and did in fact act, on the view that the winding up of the trust was a completely legal transaction, leaving the fund in his hands as his own for him to spend, and it appears to me to be contrary to all principle that the plaintiff should now be heard to question the legality of the transaction. It was argued that the claim could be treated, or ought to be treated, as an action for money had and received to which no Statute of Limitations had been pleaded. I have had some difficulty in appreciating what money it is which the defendant is to be treated as having received. It cannot be the fund, for that was never the plaintiff's. Nor can it be the income of the fund, since the fund ceased to exist as a fund even before the date of the marriage. The truth is that the claim can only be a claim for the replacement of a trust fund, and to such a claim the considerations which I have stated afford, in the circumstances, a complete defence. I am accordingly of opinion that the appeal should fail, and should be dismissed with costs.

Goddard, L.J.: In my opinion, this appeal should be dismissed, though I base my judgment on grounds somewhat different from those on which I understand that Farwell, J., decided the case.

When Mrs. Eaves went through the ceremony of marriage with Mr. Powell in 1925, in my opinion, she ceased to be the widow of Mr. Eaves, notwithstanding that subsequently the marriage proved to be voidable at her option. It is well established by authority that a marriage contracted by persons, one of whom is impotent, is valid unless and until the spouse who is entitled to complain has exercised the right of having the marriage annulled. Until this has happened, the spouses are man and wife. Were either of them to go through another ceremony of marriage, he or she would be guilty of bigamy, and it would be no defence to allege the impotence of the other party. No third party, either during the lifetime or after the death of either spouse, could be heard to say that the marriage was invalid. The marriage can be annulled only on the complaint of a party thereto and during the lifetime of both. I say of a party, because, though the rule is that only the injured spouse can complain, there have been cases of a wholly exceptional character where a petition has been admitted at the suit of the impotent party. Thus, where in Ireland a wife had petitioned the ecclesiastical tribunal of the Roman Catholic Church and obtained a sentence of nullity, which had no effect in municipal law, and had, while wholly repudiating the marriage, refused to apply to the courts for a declaration of nullity, the husband was allowed by Warren, J., and by the Court of Appeal to present a petition alleging his own impotence to get rid of an otherwise intolerable situation brought about by the wife: *A.* v. *A.* (*sued as B.*) (4), approved by the Court of Appeal in England in *G.* v. *G.* (*falsely called K.*) (5). On Mrs. Eaves' marriage to Mr. Powell, she thus became his wife *de jure* unless and until she elected to have the tie annulled. Consequently, she ceased to be the widow of her late husband, and one may well ask, supposing that the defendant had been merely a trustee under the will and not also a beneficiary, what answer could he have had to a claim by the person entitled in remainder to have the capital sum paid over to him? It is said, however, that, as soon as the plaintiff had obtained her decree absolute, she reverted to the status of widowhood, and thereby once again became entitled to the benefit conferred upon her while she was the widow of Mr. Eaves. On this A point, I am content to adopt the reasoning of LAWRENCE, J., in *Dodworth* v. *Dale* (1). That was a case in which the Inland Revenue made a claim at least as unmeritorious as that in the present action. They claimed that, as a marriage had been annulled at the suit of a wife, the husband was liable to refund the tax on the marriage allowance which had been B claimed by him and admitted during the period of the marriage. The claim deservedly failed, the judge holding that matters concluded during the period when the marriage stood could not be reopened after the wife had exercised her option to have the tie annulled. It can make no difference, in my opinion, that the transaction now called in question C took place a month or so before the marriage was celebrated. The parties deliberately put an end to the trust on the footing that the marriage was about to take place, as it did, and, though the present defendant would no doubt have been liable to replace the fund had the ceremony not been performed, once it was, both the legal and equitable interest was D vested in him, and, by the common consent of both parties interested therein, the trust was effectively wound up. The decision of RUSSELL, J., in *Re Wombwell's Settlement, Clerke* v. *Menzies* (6) also supports this view, for the judge says, at p. 308:

> It is quite true that no claim could be made by him [the settlor] for the return E of the payments made by the trustees during the time when the validity of the marriage was not questioned, for, unless and until the wife intervened, all parties were bound to treat the marriage as valid and effectual.

It was also sought to support the plaintiff's claim on the ground that here there was a case of money had and received to the plaintiff's use. F I can see no ground for such a contention. The fund never was the plaintiff's. During widowhood, she was beneficially entitled to the interest arising from it. That she surrendered when she was about to remarry, and it was entirely at her option whether or not she avoided the marriage. As SIR JAMES HANNEN, P., put it in *Turner* v. *Thompson* (7), at p. 41: G

> It is to be remembered that a marriage by the law of England, when one of the parties is incompetent, is not a marriage absolutely void, but only voidable at the instance of the injured party. If she had thought fit she might have remained a wife, enjoying all the advantages of a wife, save that of marital intercourse.

This case would hardly be arguable were it not that the form of the H decree in these cases, whatever be the ground for annulling the marriage, pronounces that the petitioner is, and always has been, free of the bonds of matrimony. In truth, however, a successful petitioner on the ground of impotence has not always been free. What is true is that he or she has always been in a position to obtain freedom, but, until the necessary steps have been taken, the tie remains binding. The reason, I think, why the decree takes this form is that it follows the sentence formerly pronounced in the ecclesiastical courts, and, when the Divorce Act, 1857, was passed, the courts set up by that Act, now represented by the Probate, Divorce and Admiralty Division of the Supreme Court, were A directed by sect. 22 to act and give relief on principles and rules as nearly as might be conformable to the principles and rules on which the ecclesiastical courts had thitherto acted. Ecclesiastical jurisprudence was grounded on the canon law, which regards marriage as indissoluble. The sentence of divorce *mensa et thoro* was only a decree of judicial B separation, while a sentence of divorce *a vinculo matrimonii* was not one granting a dissolution of the marriage, but was in effect a declaration that no marriage ever existed. The canon law, however, did grant relief when one of the parties was incapable of performing one of the purposes for which marriage was instituted. Therefore, as the marriage C could not be dissolved, recourse was had to the same form of sentence as in the case of a marriage void on the ground of bigamy, consanguinity, non-age or undue celebration. In none of these cases is intervention of the court an absolute necessity, as it is in the case of impotence, to free the parties. The object and advantage of obtaining a decree in those D circumstances is by obtaining a judgment *in rem* to put at rest for all time the question as to whether the parties were lawfully married and whether or not one is free to marry again during the lifetime of the other. It may be that it would be more logical to treat impotence as a ground of divorce, as it is in America, where the jurisdiction is not hampered by E the rules of the canon law. Be that as it may, the marriage is valid until it is annulled by a decree of the court, and transactions which have taken place during the marriage on the footing that it is subsisting, or in direct contemplation of a marriage which afterwards takes place, cannot be affected by a subsequent decree of annulment. I need hardly F add that quite different considerations would apply were the marriage void, and not merely voidable.

It remains to deal with the grounds on which the judge based his judgment in favour of the defendant. He found, as I read his judgment, that, though the plaintiff was the widow of the testator, she was disentitled G to recover in the action by reason of her laches and acquiescence. I have already dealt with the question of the widowhood. So far as the judgment is founded on acquiescence, I think that it is on sure ground. It is because the plaintiff acquiesced and consented to the money being appropriated by the defendant that she cannot recover. In my opinion, H however, laches—that is, delay in bringing the action, or, at least, in notifying her claim—raises a question of some considerable difficulty, and I am indisposed to base my judgment on that ground, apart from the fact that it was not pleaded. The main difficulty I feel is to say from what time or at what point the delay began, and how it affected the defendant. Laches is a part of the law of estoppel, and, as I understand the doctrine, it is that, if a person has stood by and allowed another to order his affairs on the footing that a certain state of things exists, or that a certain transaction is not questioned, he cannot thereafter be allowed to come in and assert the contrary to the detriment of the other party. Here, however, the detriment would arise at once. Having got the money, and having very likely spent it, the defendant might be A equally prejudiced whether the plaintiff had made her claim 12 days or 12 years after the ceremony took place. When one considers the delicate and intimate nature of the matters involved where questions of impotence arise, it seems to me impossible to say at what particular time the plaintiff ought to have made a claim against, or disclosure to, the defendant. B While delay is one of the discretionary bars to divorce, it is not so to a petition for nullity. Precipitate action in these cases ought to be discouraged. Patience and forbearance, at any rate in the case of young married people, may remove the ground of complaint, and, while the defendant is not affected by considerations affecting only the husband C and wife, I find it very difficult to say that at any particular time the plaintiff was guilty of unreasonable delay in making her claim and thereby prejudiced the defendant. It is, I think, this very difficulty that lies at the root of the doctrine that transactions completed during the existence of the union cannot be re-opened after the decree of nullity D has been obtained, and it is on that ground that I prefer to base my judgment.

I desire to add that I am not satisfied that it necessarily follows that, if a man leaves money to his wife during widowhood, or "while she remains my widow," she can, after contracting a marriage which she E subsequently avoids, say that she has reverted to the status of widow of her former husband, at any rate, for the purpose of retaking benefits under his will. I think that most testators would be surprised to learn that this result would follow, more especially when it is remembered that the plaintiff can now apply, under the Supreme Court of Judicature F (Consolidation) Act, 1925, s. 190, for maintenance against the man whom I may call the second husband. It is unnecessary to decide this in the present case, and I desire to reserve my opinion upon it.

Appeal dismissed with costs.

Solicitors: *Gisborne & Co.* (for the appellant); *Ward, Bowie & Co.*, G agents for *Lane, Clutterbuck & Co.*, Birmingham (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

APPEAL OF ROBERTS, *Re* POSTMASTER-GENERAL.

[KING'S BENCH DIVISION (Branson, J.), **November 2, 1939.**]

Work and Labour—National health insurance—Employment—Sub-postmaster—Remuneration by scale payment—National Health Insurance Act, 1936 (*c.* 32), *Sched. I.*

The applicant was a sub-postmaster remunerated by scale payment, that is, a sub-postmaster rendering on the average eighteen or more hours of personal service in each week in that capacity, and not mainly dependent for his livelihood on the earnings derived by him from any occupation other than his employment under the Postmaster-General. Regulations were provided for the guidance of sub-postmasters, who were required to observe with accuracy and promptitude all special instructions received from the head postmaster and to keep open the sub-offices for certain fixed hours for the transaction of post office business. These hours could not be varied without permission. Certain rules of conduct were prescribed. Sub-postmasters were permitted to make suitable provision for the performance of their duties by others under their supervision. It was one of the usual conditions of their employment that they should obtain a 6-months' tenancy of the premises to be used as a sub-post office. On their signing a declaration that they were not mainly dependent for their livelihood on earnings derived from occupation other than post office employment, and that they rendered an average of not less than 18 hours' personal service in each week in that employment, they were insured under the National Health Insurance Act:—

HELD: the applicant was employed under a contract of service, and was insurable under the National Health Insurance Act, 1936.

[**EDITORIAL NOTE.** This is a test case upon the question whether or not sub-postmasters engaged upon the usual terms upon which such officers are engaged—commonly called remuneration by scale payment—are insurable under the National Health Insurance Act, 1936. The principles which decide whether a person is a servant or an independent contractor are well-settled, and are not here called in question in any way. The position of these officers, however, had been rendered doubtful by decisions upon the exemption from rateability of sub-post offices. In the course of the judgments in those cases, certain statements had been made which suggested that these officers were independent contractors, and, if that were so, they would not be insurable under the Act. The present decision makes it clear that they are so insurable.

AS TO PERSONS INSURED UNDER THE NATIONAL HEALTH INSURANCE ACT, see HALSBURY, 1st Edn., Vol. 28, Work and Labour, pp. 905-911, paras. 1610-1614; and FOR CASES, see DIGEST, Vol. 44, pp. 1308-1311, Nos. 140-154.]

Cases referred to:

(1) *Williams* v. *Neath Assessment Committee* (1935), 154 L.T. 261; Digest Supp.

(2) *Frampton* v. *Gillison,* [1927] 1 Ch. 196; 40 Digest 323, *2729*; 95 L.J.Ch. 555; 136 L.T. 600.

CASE STATED by the Minister of Health under the National Health Insurance Act, 1936, s. 161, and R.S.C., Ord. 55B, rr. 4, 5. The facts are fully set out in the judgment.

A. S. Comyns Carr, K.C., and *L. G. H. Horton-Smith* for the National Federation of Sub-postmasters and the applicant.

Valentine Holmes for the Minister of Health.

J. P. Ashworth for the Postmaster-General.

Branson, J.: The question which it is desired that I should decide is set out at the end of the case in the following words:

> The Minister, being desirous that the question whether sub-postmasters remunerated by scale payment are employed under a contract of service by the Postmaster-General, and therefore insurable under the provisions of the Act, shall be determined by the court, has stated this case accordingly.

It appears to me to be clear that the question whether or not sub-postmasters remunerated by scale payment come within the National Health Insurance Act must depend, in the first instance, upon the further question whether or not their employment is employment within the National Health Insurance Act, 1936, Sched. I, Part 1. That enactment provides that employment in the United Kingdom under any contract of service shall bring the person so employed within the ambit of the Act. What I have to decide, therefore, is whether the sub-postmaster in question, William Stanley Roberts, is a person who is employed under a contract of service, and, incidentally, whether other persons employed under conditions similar to those under which William Stanley Roberts is employed will also come within that definition, and be persons employed under a contract of service.

I do not think that there is any real dispute as to what "employment under a contract of service" means. There can be no doubt that these sub-postmasters are employed. The only question is whether they are employed under a contract of service or whether they are employed to render services. The distinction between those two positions is not in doubt, and depends upon the amount of control which the employer exercises over the person whom he employs. I think that it may be stated thus. Where a man employs another to do work for him under his control so that he can direct the time when the work shall be done, the means to be adopted to bring about the end, and the method in which the work shall be carried on, then the contract is a contract of service. If, on the other hand, a man employs another to do certain work, but leaves it to that other to decide how that work shall be done, and what steps shall be taken to produce the desired effect, then it is a contract for services.

Having that distinction in mind, I turn to the facts of the present case, in order to see under which head this particular case, and other cases which will be substantially similar, should be held to fall. The case stated sets out as material the following facts. It states that on Nov. 26, 1936, the applicant applied for the appointment of sub-postmaster at a certain post office in succession to his father, who had held the appointment, and a copy of his application is appended to the case. Before submitting his application, the applicant detached and retained that part of the form sent to him which contains particulars of the appointment, and that also is attached to the case. After that, he was notified of his appointment, and he acknowledged the receipt of a number of books of rules and instructions, and agreed to be bound by the rules contained in those books of rules. He also signed a form which was sent to him, Form S 52, in connection with the question of his liability under the National Health Insurance Act, and certain declarations which were required in order to see whether he came within the ambit of the Act as interpreted by the Minister of Health and the Postmaster-General. I shall have to refer to those forms, but, taken together, they constitute the contract under which this sub-postmaster was employed, and under which other sub-postmasters in similar positions are also employed.

I do not think that it is necessary to go into any further detail as to the facts of the case, but it is necessary to look at the documents constituting the contract between the parties. The first of these documents is the application for appointment to a vacant sub-postmastership. That is filled up by the applicant, and amongst other things, it asks in para. 11 (*a*):

> Have you or has any member of your household ever held an appointment as sub-postmaster or been employed by the Post Office or any other government department?

In para. 11 (*c*), it says:

> If you are in receipt of a pension in respect of such service, state amount.

There from the very beginning it appears that the people who are dealing with these forms regard the contract between the Postmaster-General and the sub-postmaster as a contract of service, and the same thing runs throughout the whole of the documents which have been produced before me as relating to this question. Attached to that form was another one, which the applicant for the position keeps. It sets out the nature of the employment into which he is proposing to enter, and there again it appears, amongst other things, that he is to undertake, if called upon to do so, any of a number of duties which are set forth in the document, or any other official duties which may be required. He will receive instructions in the duties, and will be supplied with books of rules for his guidance, with the contents of which he must make himself well acquainted. After his application has been received, he receives his appointment, and upon that he is called upon to sign the document Form S 52, to which I have already referred. It states that William Stanley Roberts has been appointed sub-postmaster, and so forth, on the usual conditions, and on the understanding that a 6-months' tenancy of the premises is obtained. Then he acknowledges receipt of a number of books of rules, and copies of forms, instructions for telegraph service, a tape for measuring parcels, and all kinds of details showing how he is to conduct the duties of the office to which he is being appointed, and he is made to undertake that he will make proper provision for telegraph and telephone work, and provide for a continuous telephone service, if at any time required to do so, at the standard rate of payment, and so on. Then at the end this appears:

> The question of insurance has been considered in connection with the rules relating to the application of the National Insurance Acts to Post Office service:-

He is being insured as he has signed Declarations A and C on Form P 409W and I think these declarations correctly represent his circumstances.—E.S.R. for Head Postmaster.

Declaration A states as follows :

> I am not mainly dependent for my livelihood on the earnings derived by me from occupation other than post office employment.

Declaration C states as follows :

> I render on the average not less than 18 hours' personal service each week in my employment as a sub-postmaster.

The reason for those declarations arose out of the making of an order under the power given by the National Health Insurance Act, 1924, which are still in force—namely, S.R. & O., 1932, No. 501. Sched. I of the Act provides in Part I what employment shall be employment within the meaning of the Act, and Part II contains certain exceptions. Under part II, cl. (*m*), there is excepted employment of any class which may be specified in the special order as being of such a nature that it is ordinarily adopted as subsidiary employment only, and not as the principal means of livelihood. Statutory Rules and Orders, 1932, No. 501, is a special order made to meet that provision, and, by virtue of that order, the employment as a sub-postmaster remunerated by scale payment, which this postmaster is, is excluded from being employment within the meaning of the Act, subject to the fact that persons engaged in that particular employment are included in the Act as engaged under the conditions mentioned in Sched. II of the order. Sched. II of the order mentions any person employed as a sub-postmaster remunerated by scale payment who renders on the average 18 or more hours of personal service in each week in that capacity, and is not mainly dependent for his livelihood on the earnings derived by him from any occupation other than his employment under the Postmaster-General. The effect of that order, so far as the contemplation of those who made the order is concerned, is to provide that a sub-postmaster who is able to make the two Declarations A and C in Form P 409W to which I have already referred is not excluded from the Act by virtue of the first words of the order excluding employment as a sub-postmaster remunerated by scale payment. I thought at one time that it was going to be argued that that order had the statutory effect of bringing this particular type of sub-postmaster within the Act, whether or not the persons in that class would otherwise have come within the first words of Sched. I, Part I : "Employment in the United Kingdom under any contract of service." However, that was a misapprehension on my part. The point which is relied upon is that it shows that those who had to deal with the matter had all been under the impression that this type of employment was employment under the Act, and made the holders of those posts insurable persons. The question whether or not they were right in that view is, of course, still open. I refer to it in order to explain these two declarations in the form in Appendix D.

Then there are a number of rules—for instance, in Appendix E, sect. A (1), general rules—to which I have been referred, and I think it is quite unnecessary for me to refer in any detail to the numerous provisions which those rules contain, showing the amount of control which is exercised by the Postmaster-General, and through the head postmasters in different districts, over the sub-postmasters and persons whom they employ to assist them. I will refer to a few. I take first of all, in the introductory rules in Appendix E, r. 2, which refers to the Post Office Guide:

> The rules are to be read in conjunction with the Post Office Guide (including supplements), a copy of which is supplied to every sub-postmaster on publication. The Guide must be regarded as a book of instructions for officers of the Post Office no less than as one of reference for the public.

Now what does that mean? Does it not indicate that here is the Postmaster-General providing a code of rules under which every step of the duties of the sub-postmaster is defined? The Post Office Guide says to the public, "You can do this, that and the other through a sub-post office," and this rule says to the sub-postmaster, "I instruct you to do those things in that way, and, if I choose to alter it by a supplement, you shall do it in the way in which the supplement says it shall be done." Then r. 6 (*a*) provides as follows:

> The regulations provided for the guidance of sub-postmasters must be carefully studied and applied by them, and all special instructions received from the head postmaster should be carried out with accuracy and promptitude.

Provisions of that sort in the contract between the parties are very strong to indicate that the contract constitutes a contract of service. They are not saying to the sub-postmaster, "You are to carry letters which are handed to you, and the way in which you shall receive them and the way in which you shall carry them rest with you." They are saying, "You shall do this, that and the other," indicating step by step the times when, and the methods by which, the duties of the sub-postmaster are to be carried out. Another rule to which I might refer is r. 25, which provides as follows:

> The hours of business at sub-offices on week-days, Sundays and bank holidays are fixed by the head postmaster according to local circumstances, and are stated on the window notice supplied. (*b*) A sub-postmaster must not without permission vary the authorised hours of public business at his office or transact Post Office business with the public outside those hours, except that where possible attention should be given to call-office calls, at any rate in cases of emergency.

Then it is said that the hours of business are liable to be increased or altered by the department at any time, if circumstances require. That provides that the times during which this man shall work may be dictated by his superiors in the service of the Post Office, and may be altered without his consent, and he is bound to take those instructions, and abide by them.

Then there is a little *fasciculus* of sections, sects. 59, 60, 61 and 62, which prescribe rules of conduct which he shall observe, and which have nothing directly to do with the duties which he is called upon to perform.

He is not to bet or gamble, or play cards, except in the private apartments of resident officers, and there are rules about football and racing competitions, and he must not take a gratuity unless he is a postman. All that sort of thing indicates a contract of service, the rules of conduct of the service being prescribed for him, and seems to me to be very far indeed from the sort of thing which can be expected in a contract for services, where, so long as the contractor performs the service which he has contracted to perform, he is otherwise a free man, and can do what he likes. Then sect. 64 dictates to him the attitude he is to take up on political matters, and there again his actions are controlled by the rules of his employment. Sect. 72, which is a section dealing with national insurance, seems to me to be a section which makes it perfectly plain that these parties in the contract are under the impression that they are entering into a contract of service, because it is only if this is a contract of service that any reference to national insurance finds a place in it at all. Here one has in the contract documents themselves a reference to the National Health Insurance Act, and that can only be upon the basis that these parties are entering, so far as their own minds are concerned, into a contract of service. That seems to me, really, conclusive of the matter. The relationship which the parties undertake towards each other must, as it seems to me, depend upon the volition of the parties, and, if they enter into a contract intending that it shall be a contract of service, the mere fact that it contains provisions which are not ordinarily found in a contract of service cannot, as it seems to me, change that which they are entering into with the intention that it shall be a contract of service into something which is not a contract of service. Apart from that, however, the matters which are relied upon by those who argue that this is not a contract of service do not seem to me to weigh at all appreciably against the mass of provisions which are consistent with this contract being a contract of service, and consistent with that only. It is said that the fact that a sub-postmaster may delegate his duties to assistants who are his servants, and not the servants of the Crown, shows that his service is not under a contract of service. It does not seem to me that that really carries the matter any further. The provision about delegation is contained in cl. 24:

> A sub-postmaster must either himself perform the duties of his office or otherwise make suitable provision for their proper performance. In any case he will be held responsible for the proper performance of all the duties of his office, and he is expected as far as possible to exercise personal supervision over them.

There it is said that this man need not give personal service. He may be only a man who is providing service for the Crown, but is not himself a party to a contract of service. I think that the answer to that is that people who come within the category in which this sub-postmaster stands are people who can sign the Declaration C in the form in the appendix to which I have already referred. If they can sign the

Declaration C in that Appendix D, stating that they render on the average not less than 18 hours of personal service each week in their employment as a sub-postmaster, that disposes of the point that, under their contract, they are not liable to render personal service at all.

It is also said that, under r. 30, a postmaster must provide, and pay for, any assistance required to conduct the indoor work of the sub-post office, and that the remuneration is intended to cover such cost. The fact that you may remunerate a servant upon a scale which is intended to enable him to hire help for himself in the performance of his duties does not, as it seems to me, prevent him from being a servant, or prevent the contract between you and him from being a contract of service. That point, again, in my opinion, fails. It is said also that he has to provide his own office fittings, or the premises upon which he is to perform his duties. Again, I ask, is there any reason why a contract of service should not include a provision that the servant should perform those duties which he is engaged to perform upon the premises provided by himself, or with tools which are his own tools? I can see none. For these reasons, I have come to the conclusion, without reference to any authority on the subject, that this contract is a contract of service, and that persons in the same category as this sub-postmaster are persons who are insurable under the National Health Insurance Act.

As I understand it, this reference to me has arisen, and has arisen only, by reason of a decision of the Divisional Court in *Williams* v. *Neath Assessment Committee* (1), because, prior to the decision of that case, the view taken both by the Minister of Health and by the Post-master-General, and by sub-postmasters employed under terms similar to those under which the present sub-postmaster is employed, has always been that such persons are within the National Health Insurance Act, and that they should be insured. The question is whether anything that was said in *Williams* v. *Neath Assessment Committee* (1) compels me to decide that the view which they have taken was wrong, and the opinion which, apart from authority, I have taken, is wrong, and I am driven to come to a different decision in the matter. I think that I ought to say that, looking at the peculiar position in which I, as the judge designated to deal with these cases, find myself, I think that the question as to how far, if at all, I am bound by decisions in the courts on matters which are not matters of the general law of the land is one which may be open to discussion. However, I do not think that it arises in the present case, because I think that *Williams* v. *Neath Assessment Committee* (1) is plainly distinguishable from the case with which I have to deal here. That case came before the King's Bench Division as an appeal by case stated by the Neath Assessment Committee from a decision of the Glamorganshire Quarter Sessions, and the case raised the question of the exemption of sub-post offices from rateability. By the Rating and Valuation Act, 1925, s. 64 (3), it is enacted as follows:

> Where any hereditament is occupied by or on behalf of the Crown for public

> purposes (*a*) no gross value shall be determined or entered in the valuation list in respect of the hereditament . . .

In that case, the owner of certain premises, who was the respondent to the appeal, had a wife who was the sub-postmistress. The owner occupied certain premises, and allowed his wife to carry on the sub-postmistress's business in a part of those premises, and it was argued that, by reason of the fact that the sub-post office was carried on in a part of those premises, the owner was entitled to say that no gross value should be determined or entered in the valuation list in respect of that part of the premises. The ground was that it was being used as a sub-post office, and was, therefore, in the occupation of a servant or agent of the government. The point which the court had to determine was whether or not those premises were rateable. I have not to determine here whether or not premises upon which a sub-post office is being carried on are rateable. What I have to determine here is whether or not a sub-postmaster is under a contract of service with the Postmaster-General. It is true that, in giving his judgment reversing the decision of the Court of Quarter Sessions, Lord Hewart, L.C.J., referred to the position of the sub-postmistress, saying that it was made plain by the documents appended to the case entitled "Instructions to the post-master at Port Talbot" and "Post Office Rules." He pointed out that it was her duty to provide suitable premises and suitable equipment for the carrying on of the post office business, and, subject to certain exceptions, she was entitled to carry on business other than postal business on the premises. The difficulty is created because Lord Hewart, L.C.J., went on to say that the only possible conclusion was that the sub-postmistress was neither a servant nor an agent of the Postmaster-General, but was an independent contractor, who had agreed on certain terms to transact on her own premises certain business connected with the postal services. The case does not state which, if any, of the documents which are before me were before Lord Hewart, L.C.J., in that case. I think that it would be quite wrong for me to assume for a moment that, if he had had before him the documents which I have had placed before me, he would have come to any such conclusion upon them. To think so would be the wildest guesswork. He was giving a decision upon a case stated, and the case stated did not raise the point with which I have to deal. It was quite immaterial in that case to decide whether or not Mrs. Williams was under a contract of service with the Post Office, and, furthermore, even if she had been under a contract of service with the Post Office, it did not solve the question as to whether or not her husband's premises, upon which he allowed her to carry on this business, could properly be said to be a hereditament occupied by or on behalf of the Crown for public purposes. I think that I cannot regard myself as bound by that decision. The other two judges, who concurred that the appeal should be dismissed, put their judgments upon different grounds, in which the question whether or not the sub-postmistress was in the service of the Crown was not dealt with in any way. If one is to take notice of *obiter* expressions of that sort in previous cases, it is pointed out to me that there is another *obiter* decision, this time by the late LORD HANWORTH, M.R., in the Court of Appeal, in *Frampton* v. *Gillison* (2), at p. 203. There, again, the question was not the question with which I have to deal. The question there was whether or not the carrying on of the business of a sub-post office upon certain premises where there was a restrictive covenant preventing trading on the premises constituted an infringement of that covenant, and LORD HANWORTH, M.R., said, at p. 203:

> Now looking at the covenant from that right perspective, the learned judge was quite correct in saying that the duties of the defendant are altogether outside the covenant. As sub-postmaster he is the servant of the Postmaster-General, and he has duties which are well defined. . . . But whatever be his duties, it appears to be a stretching of words to say that he is "trading" on this land.

There, again, it was unnecessary to say in that case that the man in question was the servant of the Postmaster-General, just as it was unnecessary in the case before the Divisional Court.

I think that the proper course for me to take is to decide this case on the facts which are placed before me, facts which I cannot in the least be sure are the same as those before those two other tribunals, and to answer the question which is put by the Minister in para. (4) of the special case by saying that sub-postmasters remunerated by scale payment under contracts similar to that which is now before me are under contracts of service with the Postmaster-General, and therefore insurable under the provisions of the Act.

Solicitors: *Simpson, Palmer & Winder* (for the National Federation of Sub-postmasters and Roberts); *The Solicitor, Ministry of Health* (for the Minister of Health); *The Solicitor, Post Office* (for the Postmaster-General).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

APPEAL OF THOMPSON, *Re* A. JOHNSON (HOVE), LTD.

[KING'S BENCH DIVISION (Branson, J.), **November 2, 3, 1939.**]

Work and Labour—National health insurance—Employment—Bailee of motor car used for plying for hire—Whether in employment of bailor—National Health Insurance Act, 1936 (c. 32), *Sched. I, Part I, cl.* (*e*).

The respondents hired a motor car to the applicant, a taxi-cab driver, in consideration of certain weekly payments, it being the clear intention of both parties that the car was to be hired to the applicant in order that he should use it for plying for hire. It was contended that the applicant was employed by the respondent within the meaning of the National Health Insurance Act, 1936, Sched. I, Part I, cl. (*e*):—

HELD: (i) "employment" in the National Health Insurance Act, 1936, Sched. I, Part I, cl. (*e*), connoted something being done under a contract, express or implied, with someone standing in the position of an employer.

(ii) in the circumstances of this case, the applicant was employed by the respondents within the meaning of the National Health Insurance Act, 1936, Sched. I, Part I, cl. (*e*), and was insurable under that Act.

[**EDITORIAL NOTE.** This case is the first decision under the clause (*e*), which is peculiar, in that it speaks of employment by reference to a contract of bailment, and leaves a doubt as to how far the principles underlying the contract of master and servant have to be applied in cases within that clause.

As to Persons Compulsorily Insured, see HALSBURY, 1st Edn., Vol. 28, Work and Labour, pp. 905-911, paras. 1610-1614; and for Cases, see DIGEST, Vol. 44, pp. 1308-1311, Nos. 140-154.]

Case Stated by the Minister of Health under the National Health Insurance Act, 1936, s. 161. The facts are fully set out in the judgment. The National Health Insurance Act, 1936, Sched. I, Part I, cl. (*e*), provides as follows:

> Employment in the United Kingdom in plying for hire with any vehicle or vessel the use of which is obtained under any contract of bailment (or in Scotland any contract of letting to hire) in consideration of the payment of a fixed sum or a share in the earnings or otherwise, and the person from whom the use of the vehicle or vessel is so obtained shall be deemed to be the employer for the purposes of this Act.

G. R. Blanco White, *K.C.*, and *A. H. Forbes* for the applicant.
Valentine Holmes for the Minister of Health.

Branson, J.: This is a case stated by the Minister of Health under the provisions of the National Health Insurance Act, 1936, s. 161, and it raises a question as to whether one William Henry Thompson was employed under the National Health Insurance Act, 1936, Sched. I, Part I, cl. (*e*), so as to bring him within the scope of that Act and cause him to be a person who ought to be insured.

There are really two steps in the consideration of this case. The first is to see exactly, if one can, the meaning to be applied to the word "employment" in Sched. I, Part I, cl. (*e*), and then the second question must arise as to whether or not, in the circumstances of this case, the applicant, William Henry Thompson, was employed within that meaning. I propose to deal with the two questions in that order.

It is said in the first place that "employment" simply relates to the man's occupation, just as one may say that a child was employed in making a sandcastle or a man was employed in reading a book. It is said, on the other hand, that the word "employment" connotes something being done under a contract, express or implied, with somebody who stands in the position of an employer. It is said that, if that meaning is adopted in this case, Thompson was not employed, because he had no contract with anybody to do anything material in the present case. I find it difficult to be certain that the opinion which I have formed is a correct one, but, having formed it, I feel I am obliged to state it. When one looks at the form of Sched. I, one notices that it is headed "Employments within the meaning of the Act," and, when one looks at each of the separate headings under (*a*), (*b*), (*c*), (*d*), (*f*) and (*g*), leaving out the one in question, every one of them relates to cases where there is a contract of some sort between the two parties involved in the matter. Clause (*a*) is perfectly clear—employment under a contract of service—and cl. (*b*) also—employment under a contract as master or a member of the crew of a ship. Clause (*c*) is employment as an outworker. There A the parties involved are the person who is going to do the work and the person who gives out the work to be done, and, though it is obvious that they are not in the relation of master and servant, yet they are persons who are entering into mutual contracts under which the one gives out the work and the other takes it and does it. There the person B giving out the work is deemed to be the employer. Clause (*d*) is "Employment in the United Kingdom under any local or other public authority. . . ." I cannot imagine that occurring without some contract between the person employed and the local authority. It need not be a contract of service. There must be something which the local authority C has contracted that the other person shall do. Again, clause (*f*) deals with "Employment . . . by way of manual labour under a contract . . ." and cl. (*g*) with "Employment as master or a member of the crew of any fishing or other vessel." Is there any reason why the word "employment" in the critical cl. (*e*) should have any meaning given D to it different from the meaning which it bears in every other clause of Sched. I? I find it very difficult to come to any conclusion other than that it should bear the same sort of meaning. I do not mean to say that I think it is necessary that one should be able to point to a concluded contract under which the one person is bound, at all events, E to perform certain acts for the benefit of the other. It seems to me that it might well be possible to say that a person is employed by somebody in plying for hire if, on an examination of the contract between them, one finds that certain benefits are given to the person alleged to be employed in return for something which he has to do, if not by virtue F of a contract, at least by virtue of the common intention of the parties that such things shall be done. To put the thing in a concrete form as near as possible to the present case, if one finds that a car is hired, or a bailment made of any goods, to a person who is to pay money for that bailment, and it is plain, when one looks at the relationship between G the parties, that it is intended and contemplated that the article so bailed shall be used in a certain way, it seems to me that it would not be unfair to say that the employment of the bailee is to do that which it is contemplated that he will do, and without which the contract would never have been entered into and would be nugatory and futile.

H With that as an explanation of the meaning which I think should be given to Sched. I, Part I, cl. (*e*), I turn to the facts of the present case. There is no dispute about them. They are set out in the case stated by the Minister, and I may sum them up shortly as follows. The applicant Thompson had for many years been the owner-driver of a taxi-cab in Brighton. In 1936, competition arose, and, in order

to meet the competition, the applicant and a number of other taxi-cab
drivers in Brighton in a similar position to that in which he was himself
formed an association called the Streamline Association. That
association approached various motor-car dealers with the object of
ascertaining on what terms they would supply cars to the members
of the association for the purpose of plying for hire to meet that A
competition. The respondents offered the most favourable terms,
and consequently the applicant entered into an agreement with
the respondents under which the respondents themselves entered into
a hire-purchase agreement with third parties and proceeded to agree
to bail this motor car to Thompson on the terms that he should pay B
them a certain sum per week. When one looks at the contract under
which this car was bailed, it is quite clear that the parties contemplated
that this vehicle was being bailed to the applicant, and was being
accepted by him, in order that he should use it for plying for hire in
the streets of Brighton. It is quite true that there is no express clause C
in the contract compelling him at certain times and seasons to be in
the streets plying for hire. It is also plain that the respondents had
no interest directly or by contract in the amount of the money that
he should receive by hire, but it is plain that the plying for hire was the purpose
for which the bailment was made. That was the employment which D
was in the contemplation of the parties. I think that that becomes
very plain when one looks at cl. 10 of the agreement, under which the
applicant agrees that, in the event of the Streamline Association of
motor-car drivers hiring cars under this agreement being formed, he
is to become a member of that association. Although, in my opinion, E
it is necessary to find in the relationship between the parties something
which can be called a contract between the one and the other, I think
that in this case one has that relationship, and I think it is not unfair to
say that, although Thompson was not employed to use this car as a servant
under any express contract to do so, it was in the plain contemplation F
of the parties that he should ply for hire in the streets of Brighton.
The consequence is that he comes within Sched. I, Part I, cl. (*c*), and the
decision of the Minister that he had been employed within the meaning
of Sched. I, Part I, cl. (*c*) is a correct one. That being so, of course it
follows that the decision that he was employed by the respondents G
is also correct, and, therefore, the appeal is dismissed.

Appeal dismissed with costs.

Solicitors: *Thomas Eggar & Son*, agents for *Nye & Donne*, Brighton
(for the applicant); *The Solicitor, Ministry of Health* (for the Minister
of Health). H

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

PETRIE *v.* MACFISHERIES, LTD.

[COURT OF APPEAL (Slesser and du Parcq, L.JJ., and Atkinson, J.), **November 16, 17, 1939.]**

Master and Servant—Remuneration—Wages—Illness—Notice in place of A *employment that half-pay would be paid ex gratia during illness—Employee accepting such payments—Claim for full wages in respect of later illness—Implied term in contract of employment.*

The plaintiff entered the employment of the defendants in 1930, at a wage of £2 15*s.* per week, which by July, 1935, had been increased to £3 2*s.* 6*d.* per week. Before the period of his employment, a notice had been put up by the employers in the place where the man worked B to the effect that half-pay up to a total of 21 days per annum would be allowed as an act of grace in respect of absence during sickness. The plaintiff was absent from work through illness for short periods in 1933, 1936 and 1937, and on each occasion received half-pay for the period of absence. He admitted that all he could get was an *ex gratia* payment of half-pay during 3 weeks of absence. In July, 1938, he again became ill, and was absent from his employment from that date until Feb., 1939. C He claimed full wages in respect of this period, contending that he was entitled under the terms of his contract of employment to be paid full wages during illness:—

HELD: (i) there was no evidence to support the plaintiff's contention.

(ii) having regard to the admission of the plaintiff and the facts of the case, it was clear that, at the time of the illness in question, he was D employed under a contract the terms of which were that he had no claim as of right to wages during illness.

[EDITORIAL NOTE. For some time it has been quite clear that there was an impression in some quarters that the right to wages during periods of illness had been altered by the decision in *Marrison* v. *Bell* (1). That *Marrison* v. *Bell* (1) left E the common law on this matter untouched could not be seriously doubted, but it is well that the Court of Appeal have had an opportunity of re-stating the position. At common law, a servant has a right to his full wages during illness, but this right may be, and, in practice, generally is, varied by express contract or by a practice in the particular employment well-known to the servant. Whether the practice is known to a particular employee and whether he contracted with reference and F subject to it may be very difficult questions of fact in many cases, but the legal principles governing the matter have never been in any real doubt. Their application to particular cases, if dependent upon proof of a custom or practice, is, as has been stated above, extremely difficult, and employers will be well advised to ensure that the precise position is made plain to every employee at the time of his engagement.

G AS TO WAGES DURING ILLNESS, see HALSBURY, Hailsham Edn., Vol. 22, p. 134, para. 222; and FOR CASES, see DIGEST, Vol. 34, p. 86, Nos. 631-640.]

Cases referred to:

(1) *Marrison* v. *Bell*, [1939] 2 K.B. 187; [1939] 1 All E.R. 745; Digest Supp.; 160 L.T. 276.

H (2) *Cuckson* v. *Stones* (1858), 1 E. & E. 248; 34 Digest 71, *483*; 28 L.J.Q.B. 25; 32 L.T.O.S. 242.

(3) *Warburton* v. *Co-operative Wholesale Society, Ltd.*, [1917] 1 K.B. 663; 12 Digest 378, *3122*; 86 L.J.K.B. 529; 116 L.T. 107; 10 B.W.C.C. 93.

(4) *Niblett* v. *Midland Ry. Co.* (1907), 96 L.T. 462; 34 Digest 86, *639*.

(5) *Sagar* v. *Ridehalgh (H.) & Son, Ltd.*, [1931] 1 Ch. 310; Digest Supp.; 100 L.J.Ch. 220; 144 L.T. 480.

(6) *Browning* v. *Crumlin Valley Collieries*, [1926] 1 K.B. 522 ; 34 Digest 730, *1106* : 95 L.J.K.B. 711 ; 134 L.T. 603.

(7) *Cutter* v. *Powell* (1795), 6 Term Rep. 320 ; 34 Digest 88, *649*.

APPEAL by the defendants from an order of His Honour JUDGE THOMAS in the Mayor's and City of London Court, dated May 15, 1939. The facts are fully set out in the judgment of SLESSER, L.J.

A. T. Miller, K.C., and *R. Mœlwyn Hughes* for the appellants.

David Weitzman for the respondent.

SLESSER, L.J. : In this case, the plaintiff, Samuel George Petrie, who is by occupation what is known as a smoker of fish, working in a smoke-hole on a weekly wage, sued the defendant company, MacFisheries, Ltd., for the sum of £82 17*s*. 10*d*. Of that sum, £3 2*s*. 6*d*. is for a week's wages in lieu of notice. In regard to the balance—namely, £79 15*s*. 4*d*.—that is attributed to wages from July 20, 1938, to Feb. 6, 1939, less certain deductions. The basis upon which those wages are claimed is this. They are said to be wages due to this man for a period during which he was temporarily sick but still in the employment of MacFisheries, Ltd., and it is said that, being entitled during that period to his full wages, since he was in their employment and sick, he has in fact received a sum equal in amount to his half-wages for a limited period, and that, notwithstanding the fact that he had so received that sum which was paid to him *ex gratia*, he is entitled to wages during his period of sickness.

One has to see at the outset what the contract was between this man and his employers. It is said that there is a general principle of law that, where a man is employed on a weekly service and is not paid in respect of specific work done, for the faithful service which he either performed, or would have performed but for his illness, he will be entitled during the period of incapacity to receive wages, and reliance is placed upon *Marrison* v. *Bell* (1) in particular. The headnote of the Law Reports states as follows :

> Illness of a servant, which, while it lasts, incapacitates him for the performance of his duties, but is not so long-continued or so serious as to terminate the contract of service, does not at common law suspend his right to wages under the contract.

That headnote takes that form because in *Marrison* v. *Bell* (1) there was no question but that that was a case where the man was being remunerated for faithful service performed by doing his work when in health and by trying to get well when he was sick.

The other difficult question—namely, whether or not, in *Marrison* v. *Bell* (1), the contract was one where the right to wages may depend upon the specific work done, and other problems—did not, strictly speaking, arise. As I read *Marrison* v. *Bell* (1), it was assumed that it was a case of the kind which I have indicated, though there are many cases of servants working by the day and by the week, or for longer periods of remuneration, where it does not necessarily follow that they are entitled to wages during temporary sickness. That case turned entirely on the nature of the contract and the nature of the service. The real question in *Marrison* v. *Bell* (1) was whether or not, if during illness a servant receives benefit under the National Health Insurance Act, it deprives him of his right to wages under the contract of service while he is sick, assuming, as it was assumed, that he is entitled to them.

The error has crept into some people's minds that, apart from this important question of the effect of the National Health Insurance Act, *Marrison* v. *Bell* (1) purported to lay down a new principle of law. In my opinion, it does nothing of the kind. SCOTT, L.J., who gave the judgment of the court, cites *Cuckson* v. *Stones* (2) and the other authorities which deal with this particular class of service, and I find nothing in that judgment—which is directed to the difficult question of the effect of the National Health Insurance Act—to suggest that it purports to, or does in fact, lay down any new principle of law at all.

It is said in the present case that this man's service was of the type contemplated in *Marrison* v. *Bell* (1), and that therefore he was entitled to wages during temporary sickness. The case is not quite so simple as that. This man entered into the employment in 1930 at a wage of £2 15*s.* per week. Before the period of his employment, a notice was put up by the employers in the place where the man worked, and, I suppose, in other places, to this effect:

> Camden Town Staff. Allowance during absence due to sickness or accident. Commencing Apr. 24, 1926, the undermentioned allowances will be made when men are absent: 1. During sickness: half-pay commencing from the first day's absence, up to a total of 21 days per annum. No allowance after. These allowances are purely an "act of grace" on the company's part, and cannot be claimed as a "right." The above applies to men with over 6 months' service with the company.

Had the evidence in this case been that this man, at the time when he entered into the employment in 1930, knew, and acquiesced in, these terms, I think that there could have been but little doubt that, whatever rights he may have had when no question of any term as to what was to happen when he was ill had been raised, he would in this case have disentitled himself to rely upon any such implication, because this notice, in its terms, seems to me to be inconsistent with a right to receive pay during sickness. True it is that it is stated that the allowances are an act of grace, and cannot be claimed as a right. If the man accepted the allowances on that basis, it would be a little difficult to reconcile that with his having agreed by implication to receive wages during sickness as a right. Of course, if there had been an express agreement, it would be quite different. One asks oneself whether this payment, made under an act of grace, would be set off against the wages, or whether, when he was ill, he would be in the fortunate position of getting his wages and half his wages again in the form of this *ex gratia* payment, or whether he was entitled to receive only half his wages. I think that the implication which one would be entitled to draw would be that this was in substitution of any right which he might otherwise have. However that may be, counsel for the respondent is perfectly right in saying that the evidence proves conclusively—or at any rate satisfied the judge—that this man never had his attention drawn to this notice at all. He behaved at all times as if he knew of the notice, but it is true to say that the notice was never brought to his attention, and possibly was not even in existence at the time when he went into the work in 1930.

The facts of the case are these, so far as they are material. As I have said, he went into the work in 1930 at a wage of £2 15*s.* per week. In Feb., 1930, his wages were increased to £3 per week, and in July, 1935, they were again increased to £3 2*s.* 6*d.* per week. During the period when he worked for the employers, he was on several occasions temporarily ill. He was ill in 1933, when he was away for 14 days. He was ill in Oct., 1936, when he was away for 10 days, and he was away in Apr., 1937, for 2 days. For those periods of absence he has modestly abstained from claiming any wages. In 1938, he was again ill. What was the position in 1933 with regard to his right to wages ? The judge has held that in 1933 he said that he knew that he would get half-wages. Of course, that is not strictly accurate. What he meant was that he knew that he would get a sum of money equivalent to half his wages, and that he thought it was *ex gratia*. It is not very clear from the evidence whether or not he meant that he knew that before he was taken ill in 1933. When I look at the evidence, I am inclined to think that he meant to say that he knew of the matter before he was taken ill. He was asked in cross-examination by counsel for the appellants :

> I want you to understand that I am not suggesting that there was this notice displayed in the smoke-hole at the time you were working there, but I am suggesting to you that you knew perfectly well that you and all the people who worked in the smoke-hole got half pay when they became ill.

That seems to have referred, not to this man's particular illness, but to the general custom prevailing in the place. Counsel for the appellants continued as follows :

> You knew that, did you not ?—I knew that you would get half pay, but I did not know it was . . .

Then he was interrupted. Counsel for the appellants continued as follows :

> You knew you would get half pay if you were ill ?—Well, I was told it, you know.

Then the judge asked :

> You were what ?—I heard it going on among the men, you know. That is all. But I did not know.

How he did not know, if it was going on amongst the men and was being discussed, I do not quite appreciate. Then the judge repeated the words :

> I heard among the men that the defendants paid half wages during illness.

I do not think it necessary here definitively to come to a conclusion on the state of this man's knowledge before his sickness. As I have said, in 1933 he was taken ill. He was away from work for two weeks, and during that period he did in fact receive this gratuity. He was asked these questions specifically as to his knowledge, not, I think, in regard to what happened in 1933, or, at any rate, not perhaps to conclude the matter :

> In 1933 ?—Yes. I was two weeks ill with the 'flu.
>
> For the time that you were ill in 1933 you were paid half pay ?—I got two half-weeks' pay for that.

That is a statement that he got the pay. However, the matter went farther, in this way. He was then asked :

> You knew perfectly well, did you not, in 1933, that what you got for working in this smoke-hole, when you became ill, was half pay ?
>
> JUDGE THOMAS : Not for working.
>
> It was half pay ?—Yes, I got two weeks half pay.
>
> From that time on, at any rate, you had known that that was what you would get when you fell ill ?—Yes, but I thought it was from gratitude—
>
> I am not concerned with whether you thought it was gratitude. That was what you expected to get when you fell ill, was it not ?—Yes.
>
> Not only did you expect to get half pay when you were ill, but you knew that you would get it, did you not ?—Well, I was told it by the foreman. He told me to go and get half pay.
>
> You knew that you would get it when you fell ill ?—Yes.
>
> You did, did you not ?—Yes.

As I have said, perhaps the matter in 1933 is not entirely conclusive. The critical answer appears to me to have been given in relation to the payment he got in 1936, when he once more, unfortunately, fell ill. He was asked these questions :

> You got then, did you not, half pay ?—Yes.
>
> And signed for it ?—Yes.
>
> Which was what you expected to get ?—Well, I did. I got it before. I thought I would take all I could get.
>
> And you expected to get it ?—Yes.

Then he said that in 1937 they again gave him half pay.

In my opinion, the evidence in this case being on this matter all one way, by his own evidence this man has stated that all that he could get, in his opinion, in 1933, in 1936 and in 1937, was half pay when he was ill. Whether he could get it as a legal right or whether he would get it *ex gratia* seems to me immaterial. If he had made an arrangement that, when he was ill, he was to take half pay, whether as of right or whether as gratitude, to use that expression, that seems to me to negative any presumption, if there be a presumption, that he was working upon the terms that he was to get full wages while he was temporarily sick. Of course, if there had been some specific term that he was to get those wages when temporarily sick, some other matter might have been urged. In the circumstances, however, I am unable to find, in this case, any evidence on which the judge could properly find that this man had made the contract which he must contend was the contract between himself and his employers if he is to support his claim.

I pass next to consider the judgment of the judge. He says this :

> If it had been established that the position was that the defendants intended to contract with their employees in this particular part of their premises on those terms [that they should receive an *ex gratia* payment], and that that should be a

> binding contract, I think it might be possible to find that the plaintiff had accepted those terms, and I would have been very glad to have been able to find so. . . . But it has not been proved that it was intended by the defendants, even, to be a term of the contract.

That is to misconceive the position. The plaintiff says: "I am entitled to those wages by reason of an implied term in my contract that I should be paid during sickness." His evidence is that he got all that he could get, not in the sense, as I read it, all that he could get if they would not give him more—he did not ask for more, and did not think to ask for more—but all that he was entitled to get in 1933, in 1936, in 1937 and in 1938, *ex gratia*, for 3 weeks.

I have come to the conclusion, as a matter of law, that there was no evidence on which the judge could find that a contract had been made between him and the employers so to remunerate him in 1938 as to entitle him to the wages during sickness. It may or may not be the case that the original contract did give him that implied right. I am quite satisfied that, by the time the contract was varied by the increase in wages in 1935, he had already, in 1933, agreed to this variation as regards the terms, and that in 1935 he was being paid £3 2s. 6d. per week on the terms which he himself, in his evidence, admits to be the case. For myself, I have the gravest doubt whether he ever entered into a contract that he was to be paid otherwise than on what I understand him to admit to be the general terms obtaining amongst the workers in a similar condition. I do not think it is necessary to pass judgment upon that point. It is sufficient to say that, under the contract on which he sues, which is the varied contract of 1935, when he was paid £3 2s. 6d., upon his own admission, all he could get was an *ex gratia* payment of half pay during 3 weeks of sickness, and that such an admission on his part, with complete absence of evidence to the contrary, establishes that he could not rely upon any implied term which may or may not exist at common law. For these reasons, I think that this appeal should be allowed.

du Parcq, L.J.: I have come to the same conclusion, and, now that we have heard the matter fully argued, I have no doubt that the judge's error was a mistake of law. I think that the judge formed a wrong opinion of the result of the decision in *Marrison* v. *Bell* (1). There is a passage in the judge's judgment, where he says:

> What is the position so far? There was a contract of service, and it had not been terminated. The result of the decision in *Marrison* v. *Bell* (1) is that, unless the defendants can raise something else, the plaintiff is entitled to his wages, subject to deduction of what he has already received.

The judge appears to have thought that, when once a contract of service is proved, one must assume, without more, that the workman will be entitled to his wages during temporary illness. It is interesting to see that the judge does say "subject to deduction of what he has already received," which means, I take it, subject to deduction of certain *ex gratia* payments. I say this parenthetically, because it shows that the judge did not think it possible to say that the workman was entitled to his full wages in addition to the gift, which on one view he has received, of a sum equivalent to half his wages. I thought at one time that counsel for the respondent was suggesting that the view put forward by his client, or on behalf of his client, and possibly by the judge, was that it might possibly have been the intention of the parties, or at any rate the intention of the plaintiff, that he should get his full wages in addition to those *ex gratia* payments. Those words of the judge, I think, enable one to dismiss that from one's mind.

I quite see, looking again at *Marrison* v. *Bell* (1), and looking at *Warburton* v. *Co-operative Wholesale Society, Ltd.* (3), which was there cited, that, if a reader of the report confines his attention to one sentence, and reads it divorced from its context and without relation to the subject-matter, he may come to a wrong conclusion as to what *Marrison* v. *Bell* (1) decided. It is quite true that *Marrison* v. *Bell* (1) adopted and approved the observations of Lord Cozens-Hardy, M.R., in the *Warburton* case (3), which, when they were spoken by Lord Cozens-Hardy, M.R., were, I think, merely *dicta*, and not binding upon the court. A single sentence was cited by Scott, L.J., from the judgment of Lord Cozens-Hardy, M.R., in *Warburton's* case (3), at p. 665:

> It has been long settled that a contract of service is not terminated by incapacity to work by reason of temporary illness, and that on return to work the man can recover his wages during the period of his absence. . . .

In citing that, Scott, L.J., pointed out what was perfectly true—namely, that the words were unlimited and unqualified. It was quite right, if I may say so, to point out in *Marrison* v. *Bell* (1) that no qualification was introduced by Lord Cozens-Hardy, M.R., because, so far as *Marrison* v. *Bell* (1) was concerned, it was material to notice that no such qualification was introduced or suggested as would have prevented those words from applying to the particular facts of the case in *Marrison* v. *Bell* (1). I venture to say, with great respect, that Lord Cozens-Hardy, M.R., said nothing inaccurate in that statement so long as it is read by somebody who does not expect to find in a short sentence a complete statement of the whole law. Lord Cozens-Hardy, M.R., was stating a general proposition which, for myself, I believe to be accurate—namely, if one has a weekly hiring of the servant, without more, and with nothing in the terms of it, whether they are expressed or implied, to suggest that during temporary absence through illness he is not to be paid, then one may assume that he is to be paid, and that it was the intention of the parties that he should be paid. I only hope that, in saying that, I have not said something which, again taken from its context, may lend colour to arguments which I certainly do not intend my words to support. I think that the longer one's experience becomes—and mine is short—of exercising appellate jurisdiction, the more one is impressed by the fact that a great deal of the difficulty is caused by a failure to read the whole of the judgment or to read it in relation to the surrounding circumstances, and the sometimes useful, but often only temporarily advantageous, method of taking one sentence—it may be from the judgment, it may be from the headnote—in order by the skilful use of it to persuade a judge to do something which no judgment read as a whole can possibly support. Nobody can read that statement of Lord Cozens-Hardy, M.R.—and it would be a matter of distress to him if he thought they could—without realising that, like all other statements of a general rule, it is subject to exceptions.

The first thing to remember is that one must find out what the contract is. It is quite plain to anybody that Lord Cozens-Hardy, M.R., did not mean that every contract of service, whatever terms were contained in it, must result in a liability to pay a workman during the time when he is ill. The terms in the contract may be express or they may be implied. One may have a custom. Lord Phillimore once observed that there is a custom that agricultural labourers are not paid during the time they are off work through illnesss. Probably upon that matter the knowledge of every humble country labourer is greater than that of the most eminent lawyer. When a local farmer employs him as a weekly wage earner, he knows perfectly well what the custom, which he has known since he was a child, imports into the contract. It would be idle in such a case, if what I have said about custom is right, to say that Lord Cozens-Hardy, M.R., said that, under a contract of service, the man must always be paid wages during his absence through illness. Apart from express terms or terms imported through some well-known custom, the terms may obviously have been implied in other ways. I do not dwell upon that, because in this case, when the whole of the facts are looked at, it seems to me plain, and I think that, if the judge had not attached undue importance to that isolated passage from *Marrison* v. *Bell* (1) as I think he must have done, he could have come to no other conclusion than that there was here, at the material time in 1938, a contract that, during his absence through illness, the workman was to have no right to any remuneration whatever. It is impossible, in my view, to draw any other conclusion from the facts.

Supposing that in 1938 what had happened was this. I will assume that down to that date the plaintiff had known nothing of the defendants' intention to pay nothing except an *ex gratia* payment for a portion of the period during his absence through illness. Supposing that he knew nothing about it, and then, let us say, on a Monday, the employers, being under an obligation to employ him until the end of the week and thereafter, unless they gave him a week's notice and the week's notice came to an end, had said to him, " We do not pay you if you are away ill. If you are away ill, you shall not be paid anything." He might at that stage have said : " I do not agree to that at all, and I will not work for you on those terms." Then, if on Tuesday he had fallen ill, and had been away for a day or two, I do not think the employers would have been entitled to say : " We are going to deduct something from your wages in respect of those two days." Of course, what they would have been entitled to say would be this: "If you are not prepared to work for us in the future upon these terms, we will give you a week's notice." Then, if he had said, "Very well, I agree. I quite understand that. I quite understand that, if I am ill, I have no right to remuneration at all," A and had gone on working for them, nobody could suggest, as it seems to me, that, because originally, when his employment began, no such term was introduced, that term had not become a part of the agreement.

In effect, when one looks at the facts, that is what happened, so far as the substance of it goes. If one assumes that this workman is a B reasonable man—and, if I do not assume that, I am quite unable to put any construction at all upon the conduct of the parties—he knew, and admits that he knew, long before 1938, that, if he were away ill, he would not be paid a penny as of right. It is not suggested that he thought, when he was paid *ex gratia*, that he was still entitled to wages over and above C the *ex gratia* payment. He knew that it was the intention of the firm to pay him nothing whatever as of right, if he was ill, and he knew that it was on that footing that the defendants understood that they contracted with him, and that that was their view of the contract between them. Then, if, knowing that, he makes no objection, and makes no D claim for wages, and goes back to work and accepts, as he later did, an increase in his wages, it is quite impossible for him to say that he did not agree to work for them on the footing that that was a term of the contract.

It is now quite impossible for us, as it seems to me it would have been quite impossible for the judge, had he correctly applied the law, to come E to any other conclusion than that in 1938, at the material time, it was as much a term of the contract between the plaintiff and the defendants that he should have no right to remuneration during illness as though that term had been embodied in a written contract executed in solemn form by both parties.

F I want to make it quite clear, in case any words of mine are misunderstood, that I do not rest that in any way upon the doctrine of estoppel. For reasons into which I do not think it necessary to go, I see many reasons against making any use here of the doctrine of estoppel against the workman. I simply say that the facts, proved or admitted, prove G beyond doubt that at the material time it was a term of the contract that this workman should not be entitled to any payment during his absence through temporary illness. That does not mean that the employment terminated. It means no more than what I have said, and that is, of course, quite enough for the decision of this case. I agree H that this appeal should be allowed.

ATKINSON, J.: I agree. In my opinion, the judge misdirected himself, and addressed his mind to the wrong question. I think that he began to go wrong when he said:

> What is the position so far? There was a contract of service and it had not

> been terminated. The result of the decision in *Marrison* v. *Bell* (1) is that, unless the defendants can raise something else, the plaintiff is entitled to his wages, subject to deduction of what he has already received.

Thereafter he dealt with the case, as I think, as if the plaintiff started as a matter of law with the right to wages during sickness, and as if he retained that right until he had given it up for some good consideration, and, as the *ex gratia* payment would not, in the view of the county court judge, amount to good consideration in law, the right remained. To quote his final words : " Nothing happened to do away with the plaintiff's legal rights." I think that that explains why he dealt so fully with the question as to whether or not it had become a term of the contract that the plaintiff should have half wages during sickness as a right. He held, very properly, that the half wages were never more than an *ex gratia* payment, and that they never became a matter of contractual right. Of course they never did. The real question was whether or not it was a term of the contract of employment that his wages should be paid during sickness. The defendants said that it was a term of the contract that wages should not be paid during sickness, and, because it was a term, therefore they were ready, not as a matter of right, but *ex gratia*, to pay a man half wages for 21 days. I think his view was based on a misconception of the meaning of a passage in the judgment of SCOTT, L.J., in *Marrison* v. *Bell* (1), at p. 198 ([1939] 1 All E.R., at p. 748) :

> . . . those cases say, in my opinion quite clearly, that, under a contract of service, irrespective of the question of the length of notice provided by that contract, wages continue, through sickness and incapacity from sickness to do the work contracted for, until the contract is terminated by a notice by the employer in accordance with the terms of the contract.

It is quite true that that principle is laid down without any reference to, or any limitation depending on, the terms of the contract of employment, but it is quite obvious that there must be read into it some such words as " subject to any express or implied term in the contract to the contrary." It cannot be thought that SCOTT, L.J., meant that statement to apply to a contract where there was an express term to the contrary, and his comments on *Niblett* v. *Midland Ry. Co.* (4) again show quite clearly that he was not excepting the case where there was an implied term to the contrary. It cannot be thought that that general statement was meant to apply to such contracts, for example, as those in the weaving industry, where the amount of wages payable depends on the quantity and quality of the work done, as, for example, in *Sagar* v. *Ridehalgh (H.) & Son, Ltd.* (5). It cannot be suggested that it was meant to apply to contracts where, by the custom of the industry, wages are payable only for services rendered, as with agricultural labourers, or as, apparently, in the mining industry, dealt with by GREER, J., in *Browning* v. *Crumlin Valley Collieries* (6), where the judge said that the consideration for work is wages and the consideration for wages is work. Is it to be implied in the engagement that wages are to be paid where, through no fault of the employer, the work cannot be done? The question must depend, as indicated in *Cutter* v. *Powell* (7), on the ascertaining and the construction of the terms of the contract. As was said in that case:

> The right to wages depends upon whether the consideration therefor has been performed.

A It is submitted in these notes, as I think rightly, that the question is this. It must be ascertained from the contract whether the consideration for the payment of wages is the actual performance of the work or the mere readiness and willingness to perform the work, if of ability to do so. B

In my opinion, SCOTT, L.J., has not said anything inconsistent with that submission. It must be remembered that that passage followed a reference to what the county court judge had said. He had said:

> When off sick, in the absence of any express contract, no wages due.

C I think that the court meant that the truer view was just the other way round, and that, where there is nothing in the contract, expressed or implied, to the contrary, the consideration for wages is not the actual doing of the work contracted for, but the readiness and willingness, if of ability, to do the work. If that view is right, the county court judge D should have asked himself the comparatively simple question whether or not the terms upon which the plaintiff was employed in 1938 excluded the right to wages if, through illness, no work was done. If he had asked himself that question, he could have answered it in only one way. Instead of dealing with that question, I repeat, he assumed the legal E right, and said that it had never been given up. In truth, there was no such right. For years the plaintiff had known and assented to the terms upon which the defendants employed their men, and it never entered his head that he was employed on any other terms, or that he was entitled to be paid for work he had not done, until he heard of F *Marrison* v. *Bell* (1) from somebody who misunderstood it.

I agree that the appeal should be allowed.

Appeal allowed. No order as to costs.

Solicitors: *Simpson, North, Harley & Co.* (for the appellants); *Fraser G. Millward* (for the respondent).

G [*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

APPEAL OF SHERWOOD, *Re* G. F. & A. BROWN & SONS, LTD.

[KING'S BENCH DIVISION (Branson, J.), **November 2, 3, 1939.**]

H *Work and Labour—National health insurance—Remuneration in excess of £250 per annum—Unpaid assistance of employee's wife—Whether value of such assistance may be deducted from remuneration—National Health Insurance Act,* 1936 (*c.* 32), *Sched. I, Part II, cl.* (*k*).

The applicant's husband had been employed as manager of certain licensed premises under a written agreement providing for payment of a certain salary together with occupation of the residential parts of the licensed premises free of rent, rates and taxes, the combined value of the salary and free residence being in excess of £250 per annum. It was contended that the applicant's husband had not been able to earn the whole of what was paid to him, as it had been necessary, in order to carry on the business, to have the assistance of his wife, and that this assistance, although she had actually been paid nothing, was worth not less than £78 per annum, which amount should be taken in reduction of his remuneration, and so bring it below £250 per annum :—

HELD : although circumstances involving the payment of money in order to earn remuneration may be taken into consideration in reducing the amount of such remuneration, it cannot be said that because a man gets some unpaid help, therefore his employment is at a rate of remuneration less by the amount of the help he has obtained.

[**EDITORIAL NOTE.** The remuneration of a person is sometimes fixed in the expectation that he will receive a certain amount of help from his wife or other member of his household. Unless there is an express provision that such help shall be paid for at a stated rate, this matter cannot be taken into account in deciding whether the employee is earning "not more than £250 per annum."

AS TO PERSONS COMPULSORILY INSURED, see HALSBURY, 1st Edn., Vol. 28, Work and Labour, pp. 905-911, paras. 1610-1614 ; and FOR CASES, see DIGEST, Vol. 44, pp. 1308-1311, Nos. 140-154.]

CASE STATED by the Minister of Health under the National Health Insurance Act, 1936, s. 161. The facts are fully set out in the judgment.

H. J. Astell Burt for the applicant.

Valentine Holmes for the Minister of Health.

BRANSON, J. : This is a case stated by the Minister of Health under the provisions of the National Health Insurance Act, 1936, s. 161, and it raises quite a short point in the following way. The applicant is the widow of one William James Sherwood, and Sherwood was appointed the manager of certain licensed premises. The agreement under which he was so appointed is before me. Under the agreement, he was to have a salary at the rate of £25 per calendar month, and to occupy the residential parts of the licensed premises free of rent, rates and taxes. The £25 was reduced in 1932 to £20 14*s*., but, notwithstanding that reduction, the remuneration in the agreement and the occupation of the residential parts of the licensed premises free of rent, rates and taxes, which were taken into consideration, were above the value of £250 per annum. What is said is that the Minister was wrong in holding that Sherwood's remuneration was over £250 per annum, so as to exclude him under the terms of the National Health Insurance Act, 1936, Sched. I, Part II, cl. (*k*), because it is said that it was contemplated, when he was appointed at that salary, that he was a married man, and would have the assistance of his wife in running the business. It is said that, as a matter of fact, the wife did assist in running the business, and that the value of the services rendered by the wife in connection with the business is not less than £78 per annum. It said that, although Sherwood did not pay his wife anything, yet it should be considered that the value of her services—namely, the £78—should be taken in reduction of the remuneration which was paid him by his employers, and that by those means the rate of remuneration paid to him should be held to be below £250. In arguing the case before me, counsel for the applicant has continually tried to read into cl. (*k*) such words as "the earning power" or "the actual remuneration earned by him." Those words are not in the statute at all. If Sherwood had had to pay out moneys from the £250 in order to earn the remuneration as a matter of agreement between him and his employers, completely different considerations would have arisen. What is said here is not that he has had to pay out sums of money which should be taken in reduction of the £250, but that he has not been able to earn the whole of what was paid to him because it was necessary, in order to carry on the business, that he should have the assistance of his wife. That is not what the statute says. The line to be drawn is laid down by the Act. It is quite true that circumstances which involve the payment of money in order to earn the remuneration may be taken into consideration in reducing the amount of the remuneration. To say that, because a man gets some unpaid help, and does not himself earn the whole remuneration, therefore his employment is at a rate of remuneration less by the amount of the help that he has obtained is quite a different matter. In my opinion, the decision of the Minister was right, and this appeal is dismissed.

Appeal dismissed with costs.

Solicitors: *McKenna & Co.* (for the applicant); *The Solicitor, Ministry of Health* (for the Minister of Health).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

BRITISH & ARGENTINE MEAT CO., LTD. *v.* RANDALL AND OTHERS.

[COURT OF APPEAL (Slesser and Luxmoore, L.JJ., and Atkinson, J.), **November 2, 3, 6, 7, 1939.**]

Landlord and Tenant—Compensation for goodwill—Practice—Admission of evidence on consideration of report by county court judge—Whether or not proceedings before county court judge an appeal.

The tenants of premises let to them at a rent of £200 per annum applied for a new lease under the Landlord and Tenant Act, 1927, s. 5. The matter was referred to a referee for report, and his report came in due course before the county court judge. At this stage, the landlords tendered in evidence a letter from a co-operative society, written after the report had been made, containing an offer to lease the premises for 99 years at a rental of £400 per annum, the rent which the referee had found was the goodwill rent. The county court judge refused to admit this letter. From the figures mentioned in the report, it appeared that, at the material time, a butcher renting these premises at £200 per annum would have made a yearly profit of about £300:—

HELD: (i) the county court judge was not entitled to treat the hearing before him as an appeal from the referee. He was sitting as a tribunal of first instance, and should have admitted the evidence tendered.

(ii) it being clear from the figures that there was here no goodwill in respect of which compensation could be claimed under the Act, it was unnecessary to send the case back for a new trial, and there being no right to compensation there was, therefore, no right to a new lease.

[EDITORIAL NOTE. The question at issue here is as to the function a county court judge is exercising when he is considering the report of a referee in a case under the Landlord and Tenant Act, 1927. The question is whether he is sitting as a court of appeal or as a court of first instance. The procedure envisaged by the Act is for an application to be made to the court, which application can be, and in practice always is, referred to a referee for consideration and report. The position is, therefore, that the referee is not required to give any judgment from which an appeal may be made. The proceedings before the referee are only a part of the proceedings in the matter, and no order is made in the proceedings until the matter has again been placed before the judge upon the consideration of the report of the referee. The proceedings, therefore, up to the time when the county court judge makes an order upon the report of the referee, are all proceedings in a court of first instance, and at any time before the final order in those proceedings further evidence may be tendered and admitted on the same principles as those upon which further evidence is received at the trial of an action.

AS TO TRIBUNALS FOR THE PURPOSES OF THE LANDLORD AND TENANT ACT, 1927, see HALSBURY, Hailsham Edn., Vol. 20, p. 304, paras. 351-355; and FOR CASES, see DIGEST, Supp., Landlord and Tenant, Nos. 2306a-2306s.]

Cases referred to:

(1) *Whiteman Smith Motor Co., Ltd.* v. *Chaplin*, [1934] 2 K.B. 35; Digest Supp.: 103 L.J.K.B. 328; 150 L.T. 354.

(2) *Simpson* v. *Charrington & Co., Ltd.*, [1934] 1 K.B. 64; Digest Supp.; 103 L.J.K.B. 49; 150 L.T. 103; *on appeal*; [1935] A.C. 325; 104 L.J.K.B. 226; 152 L.T. 469.

APPEAL by the landlords from an order of His Honour JUDGE CLEMENTS in the Rochester County Court, dated July 14, 1939. The facts are fully set out in the judgment of SLESSER, L.J.

M. D. Van Oss for the appellants, the landlords.

S. P. J. Merlin for the respondents, the tenants.

Van Oss: The county court judge treated the application by the landlord to reject or vary the referee's report as an appeal, and held that the burden was on the landlord to show that the referee was wrong; whereas he should have held that the burden remained throughout on the tenants who were claiming the benefit of the Act. He was also wrong in rejecting without considering it the further evidence tendered before him by the landlord. By the Landlord and Tenant Act, 1927, s. 21, the county court is made the tribunal. Under the Act the parties are to be deemed to have consented to the reference. Provision is made by subsect. (2) for the reference, but this is not obligatory, as the words "unless otherwise prescribed" show, and the rules provide for a hearing by the judge. The procedure upon and after reference is regulated by the incorporation in the subsection of the County Courts Act, 1919, s. 6 Although the County Courts Act, 1919, has been repealed, the Landlord and Tenant Act, 1927, s. 21, must still be construed in accordance with its terms, and the material county court rules are those made under the old Act. If this is not so, the County Courts Act, 1934, and the rules made thereunder have substantially the same effect, so far as the point

at issue is concerned. When the report comes before the judge for adoption or rejection or variation, he is bound to consider it and form his own judgment upon it: *Simpson* v. *Charrington* (2), *per* SCRUTTON, L.J., at p. 76. The matter is referred to a referee for convenience only, and the county court is bound to exercise its own judgment on all
A questions of law or fact: see per GREER, L.J., at p. 83.

As to the further evidence, the landlord had the right to tender such evidence as was relevant and admissible. The judge had power to consider it, and was bound to do so, particularly where, as in this case, the evidence had come into existence at a date subsequent to the report.
B Such a right could only be taken away by clear and precise enactment. There is nothing in the Act to suggest that such was the intention of Parliament. The evidence tendered by the landlords was clearly relevant and admissible, and, if it had stood unchallenged, would have been fatal to the tenants' case in that it showed that a normal rent was being
C offered which was equal to, or in excess of, the goodwill rent found by the referee. If the judge had considered the report of the referee, he must have come to the conclusion that the report should be rejected. As it has been adopted, it must be treated as part of his judgment, and an appeal lies to this court on questions of mixed law and fact
D such as goodwill and reasonableness: *Simpson* v. *Charrington* (2), at p. 77. The referee found that the goodwill rent exceeded the normal rent. There was no evidence to support such a finding, and it is clear from the report that the referee's calculations were on a wrong basis and that he ignored important matters. He cannot, by stating that
E he has applied the principles laid down by MAUGHAM, L.J., in *Whiteman Smith Motor Co., Ltd.* v. *Chaplin* (1), prevent the court from holding that he has in fact failed to apply those principles or has misapplied them. Before the tenant is entitled to a new lease under sect. 5 of the Act, he must show, among other things, that he would be entitled to com-
F pensation for goodwill under sect. 4. The referee calculated the goodwill rent by reference, among other things, to the profits of the tenants' business. He took an average of those profits over a period of years; this was entirely wrong. The figures showed that since 1933 the profits, the turnover, and the percentage of profit on turnover had
G steadily declined and that the last years must have shown a loss if the goodwill rent had been the basis of calculation. In these circumstances no prudent butcher would consider paying more than the normal rent.

Merlin: The judge was right in adopting the report. This report fully conforms with the directions of this court in *Whiteman Smith*
H *Motor Co., Ltd.* v. *Chaplin* (1), and with sect. 4 of the 1927 Act. The material evidence is set out, and the material findings of fact are all stated. He viewed the premises before and after his hearing, and viewed other comparable premises to which his attention had been drawn. The referee had ample evidence before him on which he could find as he has found with relation to normal rent and goodwill rent. The goodwill

created here was exactly the type of goodwill which would increase the rental value to the landlord when he desired to relet the premises. The referee's findings of fact were adopted by the judge in his judgment and are not subject to review by this court. By sect. 4 (1) (*d*), situational value may be assessed only in favour of the landlord, not of the tenant. In disregarding the site value, the referee has complied with the Act. The judge had discretion to accept or reject the further evidence, and rejected it in the correct exercise of his discretion.

Slesser, L.J.: The claim in this case was made on Aug. 29, 1938, and the applicants applied for the grant of a new lease of the premises in question under the Landlord and Tenant Act, 1927, s. 5. They alleged—as they had to allege, in order to satisfy sect. 5—that they would be entitled to compensation under sect. 4, but that the sum which they would be likely to obtain by compensation would not compensate them for the loss of goodwill which they would suffer if they had to remove their business to other premises. This notional sum of compensation they placed at £1,000.

On Sept. 13, 1938, the respondents, the landlords, denied that the applicants were entitled to a new lease, because, they said, no compensation was payable under sect. 4 of the Act, and in substance they said that, if the premises, which had been carried on since 1910 as a butcher's shop, were let to a trader other than a butcher, they would actually attract a rent higher than that which would be attributable to a butcher who might wish to have the premises. It was not necessary for their purposes to say that it would attract a higher rent. It would have been sufficient to have said that it would attract the same rent. That was their case, and, if their case were well-founded, it was obvious that they ought in law to succeed. I do not think it necessary at this time once more to state what has been so clearly stated by Scrutton, L.J., and Maugham, L.J., as he then was, in *Whiteman Smith Motor Co., Ltd.* v. *Chaplin* (1)—namely, that the two terminal considerations which affect the decisions in these cases are, in the first place, the ascertainment of the normal rent, and then the ascertainment of the goodwill rent within the meaning of the statute. The case here is simply this. The landlords say that, taking the definition of the normal rent laid down by Maugham, L.J., at p. 47, and taking the definition of goodwill rent, which he lays down at p. 53, which, for the purposes of the present case, for the moment I abstain from repeating, there is no goodwill rent here over and above the normal rent, when the evidence is properly examined, and, therefore, there is no compensation attributable to the outgoing tenant, and, if there is no compensation, there is no right to a new lease. That, in substance, was the landlords' case. The judge quite properly referred the matter, as he is required to do under the Landlord and Tenant Act, 1927, s. 21, to the consideration of the referee.

In so far as some argument in this case has depended upon the consideration of the respective obligations and powers of the county court judge and the tribunal in this matter, before I go into the particular facts of this case, it is convenient to state generally what I consider the constitutional position of these two authorities to be. The Landlord and Tenant Act, 1927, s. 21 (1), provides as follows:

> The tribunal for the purposes of Part I of this Act shall be the county court...

However, there is a proviso, first, that in certain cases the High Court may be the tribunal. With that matter we are not here immediately concerned, except to observe that, of course, in the case of the High Court, the references which have to be made under the Act will proceed according to the Rules of the Supreme Court, and not according to the Rules of the County Court. The principles, however, appear to me to be the same. That being the case, one turns to sect. 21 (2) of the Act of 1927, where these further provisions are enacted:

> Where proceedings are commenced in the county court in respect of any claim or application under Part I of this Act and are not transferred to the High Court, the matter shall, unless the parties otherwise agree, or it is otherwise prescribed, stand referred for inquiry and report to such one of the panel of referees appointed by the reference committee hereinafter mentioned as may be selected by the county court, as if with the consent of the parties the matter had been so referred to him in pursuance of the County Courts Act, 1919, s. 6.

In this case, the parties did not otherwise agree, and, although there is contained in the rules provisions giving power in suitable cases for the county court judge otherwise to prescribe, no other prescription was made in this case, and it is not necessary to consider, therefore, that limb of subsect. (2). However, the matter did stand referred for inquiry and report to a referee duly appointed by the reference committee, and the matter proceeded as if, with the consent of the parties, the matters had been so referred to him in pursuance of the County Courts Act, 1919, s. 6. The County Courts Act, 1919, is no longer in force. It has now been consolidated into the County Courts Act, 1934, which is expressed to be a consolidation Act, consolidating the Act of 1919 and certain other Acts. When one looks, however, at sect. 6 of the Act of 1919, which is referred to in sect. 21 (2) of the Act of 1927, one reads this:

> Subject to County Court Rules, the judge may in any case, with the consent of the parties, refer any action or matter or any question arising therein to the registrar or a referee for inquiry and report, and may direct how such reference shall be conducted, and may remit any report for further inquiry and report, and on consideration of any report or further report the judge may give such judgment or make such order in the action or matter as may be just, without prejudice to any right of appeal.

Substantially the same provision occurs in the County Courts Act, 1934, s. 90, but in both cases it is to be observed that it is clear beyond question that, the reference having been made on consideration of any report, the judge may give such judgment as may be just. That being the position, it is also clear beyond question that the tribunal which gives the judgment, and which therefore has to hear and determine the matter, is the county court judge, and not the referee. If there were any doubt upon that question, which I think there is not, it is made absolutely clear to my mind by *Simpson* v. *Charrington & Co., Ltd.* (2), where SCRUTTON, L.J., says, at p. 76:

> . . . each judge is at liberty to adopt, vary, or disregard a finding of the referee, or to hear fresh evidence on any point. . . . The judgment is to be of the tribunal, the county court judge, in a "cause or matter." A

He then goes on to point out that the first appeal is the appeal to the Divisional Court, as it was in those days. He says, at p. 76:

> In these circumstances the appeal is the ordinary appeal from a county court, in which the appellate court is bound by the findings of fact of the county court judge . . . . B

In the same case, GREER, L.J., says, at p. 83:

> It is only for convenience that the matter is referred in the first instance to a referee for inquiry and report, but on receiving the report, if the rules of practice have been complied with, the county court is bound to exercise its own judgment on all questions of law or fact, and though it would be in most cases unwise for the county court judge to arrive at a conclusion different from that of the referee on the C question as to the weight to be attached to the evidence of witnesses who have been heard and seen by the referee and have not been seen or heard by the judge, still it is to the judgment of the latter on all questions of law or fact that the statute refers the action.

Finally, EVE, J., says, at p. 94:

> As regards the relative positions of the judge and the referee, it is well settled D that under a reference to inquire and report the court may adopt or partially adopt or may reject the report as it thinks right. It is the duty of the referee to set out sufficiently the facts to enable the court to form a judgment thereon; if he goes on to state the conclusions at which he has arrived, it is open to the court to disregard them.

Both under the Act of 1919 and the Act of 1934, rules were made by the E competent rule committee dealing generally with the questions of a reference, remission, and variation of reports. We have heard some argument here to the effect that the county court judge is bound by rules made under the Act of 1919, and made under it only by reason of the fact that the County Courts Act, 1919, s. 6, is expressly mentioned in F the Landlord and Tenant Act, 1927, s. 21 (2), dealing with references which it is said are to be as if the matter had been referred "in pursuance of the County Courts Act, 1919, s. 6." It is argued that one cannot introduce into that rules made under the County Courts Act, 1934, because that would be to introduce into the legislation a matter which G sect. 21 of the Act does not permit, and reliance is placed on the fact that the phrase "subject to the county court rules" must be read in those circumstances as meaning "county court rules made under the Act of 1919." It is a fascinating question whether that argument be right or whether it be wrong. For myself, I do not pause upon the point, because H I do not think it is necessary, for reasons I will mention in a moment. My inclination is that the argument is wrong. One of the reasons which impresses me against accepting that view on the subject is this. The same subsection which speaks of "as if with the consent of the parties the matter had been so referred to him in pursuance of the County Courts Act, 1919, s. 6," speaks, in an earlier limb, of a reference being made by methods otherwise prescribed, and that other prescription could, I think, certainly be made under the consolidation Act. It is not limited in terms to sect. 6, and, therefore, rules made under the County Courts Act, 1934, would be competent—in fact, such rules have been made—for the purpose of prescribing references other than those under sect. 6 of the Act A of 1919. I think that it is in the highest degree improbable that, if the same section dealt with the same subject-matter, one would be restricted to a rule-making power by the third limb, which would deal with matters which would not apply when the matter was otherwise prescribed. These are all matters to be gathered from the language B used and from the intention of the legislature, and, for myself, I think it would be more reasonable, having regard to the time when this action was brought, to assume that the rules under the Act of 1934 were the rules in question. However, that does not matter, and for this reason. Whether one has regard to the rules made under the Act of 1934—that C is to say, rules made in conformity with sect. 90, dealing with references, in particular C.C.R., Ord. 19, r. 2 (1) (*h*)—or whether one gives consideration to the rule which has been made under the Act of 1919—namely, C.C.R., Ord. 20*a*, r. 1 (2) (*g*)—in either case, the rules merely deal with the obligation to give notice, and add, in the case of C.C.R., D Ord. 20*a*, r. 1 (2) (*g*), specific provisions that

> . . . the judge may require any explanation or reasons . . . and may remit the . . . matter . . . for further consideration, or decide the question referred on the evidence taken before the registrar or referee, with or without additional evidence, as the judge may direct. . . .

These provisions in terms do not appear to be expressed in the later E rule. I think it is quite irrelevant and immaterial, because, although the judge has those powers, and similar powers are to be found in the Rules of the Supreme Court in dealing with a reference under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 88, in any case there is nothing in those rules to limit the power of the judge as the judge of law F and fact—and the power of the tribunal has been so stated in *Simpson* v. *Charrington & Co., Ltd.* (2)—himself to consider evidence tendered to him and to perform his duty as the judge hearing and determining the matter, to consider and receive evidence tendered to him, and adjudicate whether, by reason of its irrelevance, or for some other reason, G he will not accept it. It is true, as counsel for the tenants said, that it may be he has a very considerable discretion, when the evidence is tendered to him, to decide whether or not he will accept it, and to decide what weight he will attach to it if he does accept it. The matter which is complained of here, however, is that he has never got to that H stage, and that, on this material being tendered to him, on the request of counsel for the tenants, he refused even so much as to consider the matter at all. Counsel for the landlords says that in that he was not performing his obligations as the court. It is interesting to see from the report exactly what happened with regard to this matter. The evidence which was proposed to be tendered was this. It was the letter of May 17, 1939, on behalf of the Chatham and District Co-operative Society, addressed to the landlords, and it contained an offer for a 99-years' lease of the premises in question at an annual rental of £400. That offer, of course, could not have been, if first then made, before the referee, by reason of the fact that it was only written after the report of the referee had been made. If it were a *bona fide* offer, and if the terms of it complied with all the requirements—it is a little obscure in certain matters, with regard to repairs, for example—it would have been a complete answer to the tenants' claim. The tenants, as I shall have to mention in a moment, succeeded in persuading the referee that the amount of the goodwill rent would have been £400 per annum. Here is an offer from a co-operative society. This letter, on the face of it, is a perfectly general offer by a member of the trading public at the very rent which is said here to be the rent which has been raised to that amount by reason of the goodwill created by the present tenant. It would, if it were true, show what it is said is the proper conclusion to draw from the evidence already before the judge—namely, that the normal rent is the same, or is at least as great a rent, as any prudent butcher would pay for these premises in the future. That being tendered on behalf of the appellants, counsel for the respondents objected, and took the point—I am paraphrasing for this purpose—substantially that the issues between the parties, to use his phrase, had been crystallised at the time when the matter went before the referee. I have already indicated why, in my opinion, that view is an erroneous one, and have said that nothing is decided until the matter comes back to the judge, when it is for him to adjudicate on all the proper material before him. On that, it is not very easy to understand exactly what attitude the judge intended finally to assume in this matter. He might have taken the view, acceding to the argument of counsel for the respondents, that he could not hear any new evidence at all. That would have been one way of dealing with the matter. He might, on the other hand, have said that he would consider the evidence proposed to be tendered on its merits. What he did, however, was this. He was careful to say that there might be cases where he would be prepared to consider fresh evidence, but that in this case he thought it very unusual. To quote his own language :

> In this case, a report has been made, and I think it will be a very unsatisfactory thing for me now to hear further evidence.

Finally, he says that the question is whether or not he ought to exercise his discretion in reference to hearing that evidence. The complaint of counsel for the appellants is that he never got to the point of exercising his discretion, because he refused to look at the material upon which it was sought to ask that his discretion should be exercised, and that he really in fact refused to exercise his discretion. The judge said :

> I am not going to admit this evidence. If I did so, I think it would be most unsatisfactory because it would open the door, if I may put it so, very wide.

Counsel for the appellants points out, in his wisdom, that there are occasions when it may be very necessary to open the door very wide in order that justice may creep in. However, that may be, it is quite clear to my mind that the judge, not for any reason connected with the evidence, but on general principles, has refused to consider whether or not this evidence should be considered by him, and, in so doing, he has abrogated his function as a judge, and has, in effect, treated the matter as if it were an appeal from the referee to him upon which he might be asked to consider on well-known principles of law whether or not he would accept new evidence. He has not sufficiently recognised that this was not an appeal, but that he was sitting as a tribunal of first instance, in which it was sought to put evidence before him. In my view, and the view which I say is confirmed, as I read it, by the judgment in *Simpson's* case (2), the judge was wrong in so doing.

Had the matter rested there, I should have thought that it would be necessary to have ordered a new trial for the reason that it may be that this letter has some qualities which counsel for the respondents might say would render it not reliable, or possibly valueless, as evidence. He may have said that it was obtained by an arrangement between the landlord and a third party. I do not say that he would do so, but, at any rate, we are not in a position to weigh the value of this matter as a decisive point in excluding the tenants' claim. As I say, had the matter rested there, I, for one, would not have been inclined to determine this matter in this court, but I have come to the conclusion that, on the whole facts of this case as disclosed in the report of the referee—which report, as Maugham, L.J., points out, must be treated as the judgment of the judge, since in effect the judgment says no more than that he does not wish to disturb it and will accept it, apart from this letter altogether—the tenant fails to show that there is here any such additional rent by way of goodwill properly attributable under all the statutory considerations to the tenant as will entitle him either to compensation or, consequently, to any right to a new lease.

That brings me to a consideration of the report of the referee. As the referee points out, and on this point there is no complaint made, the various questions have to be taken into consideration. In para. 12 of his report, he says that the first question which arose for decision was

> . . . whether the applicants had proved under sect. 4 of the said Act that "by reason of the carrying on by them or their predecessors of their trade a goodwill had become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto."

He then poses to himself this question: "What would the premises let for to-day to an ordinary trader other than a butcher?" He comes to the conclusion that the premises as a whole could be let to such a trader for £375 per annum, the tenant paying the rates and doing all usual repairs. Counsel for the appellants accepts that conclusion, although he had evidence which he wished to tender before the court—the evidence of the firm of Grant, Ltd., that they were prepared to pay £400—but some point arose on that as to whether or not the referee believed Grant, Ltd. I think it is sufficient, for this purpose, to bring this case within some manageable limits, to assume, against counsel for the appellants, that the referee was right when he came to the conclusion that a trader as a whole would give £375 per annum rent. It is very A much more, of course, than this butcher had been paying, but the reasons which were developed during the reference made it clear why that was so. There had been a number of multiple shops put into this particular street, and the area in which this butcher's shop was situated had become what I think is called a peak area, and had got a greatly enhanced B economic value by reason of the presence of these shops. It is quite unnecessary to go into that. Suffice it to say that I can assume that the evidence of Grant, Ltd., is to be disregarded, and, of course, as I have already said, I am disregarding the later evidence which was sought to be tendered, the evidence of the Co-operative Society, and I C will assume that the referee was entitled to find, and the judge was entitled to adopt, the finding that £375 per annum was the sum for which the premises as a whole could be let to a trader, the tenant paying rates and doing all the usual repairs. Then, as counsel for the appellants says, perfectly correctly, he addresses his mind to the second question— D namely, "What would a butcher carrying on a similar business to the applicants' give to step into the said premises with continuity in the trading?" After stating the facts on that, he comes to the conclusion that this hypothetical butcher would be prepared to pay something in the neighbourhood of £400 per annum. That is to say, the landlord has E benefited by the goodwill, that part of the goodwill which may be regarded to the extent of £25 per annum. One looks anxiously to see what evidence there was before the referee which could enable him to come to such a conclusion, that a butcher would be willing to pay £25 more than any other trader for the privilege of occupying this position. The first thing F at which the referee looked was the profits. There was put in before him a table showing the profits of this particular business. The effect of that table is, I think, quite clear—namely, that this business was slowly, but alas, surely, declining. The turnover kept decreasing, the profits kept decreasing, and the percentage of profit to turnover kept G decreasing. It was described by counsel for the appellants as a wasting business, and it had got to such a state of anæmia that, had it not been for a slight revival at the beginning of the first seven weeks of 1939, it looked, if a graph had been drawn of its future business, as if it would shortly perish altogether. H

Of course, in those profits which by 1938 had come down to £242, it must be assumed that the tenant had paid the £200 per annum rent and the rates attributable to an assessment on that figure. The profit was £242 in 1938, the last full accounting period. It occurs at once to the mind that if in 1938 the present butcher, or the son (whom counsel

for the respondents asked us to regard, I do not know why, as the most likely successor to be put in his place and set up in business), was to start off with a rental of £400 per annum, together with increased rates attributable to the raising of the rent from £200 to £400 per annum, there would have been no profit at all, and in 1937 there would have
A been no profit, and that is excluding all considerations of interest upon capital. In 1936, the matter would be at least precarious. The only possible thing which can be said is that in the first seven weeks of 1939, which is a very short period by which to estimate the matter, there was an improvement, but we do not know how far in that case expenses and
B overheads have been necessarily met. It is all conjecture. It might have been, unless something extraordinary happened to this business, that in that year this adventurous butcher, I cannot call him prudent, would have escaped insolvency. The matter is more confused and difficult to understand, however, when we read in another part of the
C report that, in the opinion of the referee, the adverse conditions, the price of meat, and other matters, were going to continue. Had he told us that the adverse conditions would not continue, it might have been that he thought that some such revival—some increase in meat-eating and a decrease in vegetarianism, or something else—had happened in
D Chatham as would have altered the position, but what he tells us is this. He tells us that the adverse conditions are likely to continue.

How has he arrived at this extraordinary sum of rent to think that a prudent butcher, faced with a profit of £200 odd, would incur a rental which, on the face of it, with the rates, would certainly (giving every
E consideration to the fact that £200 of the rent is already involved in the present profit—an extra £200 and the rates attributable thereby) have wiped out the whole of the profit for 1938? Why has he come to the conclusion that a prudent butcher would be so adventurous? He has done it, as he told us, by taking all the profits back to 1933, when the
F profit was, in that year, £882 on the turnover of £9,669—that is to say, when the profit was only three times what it was in 1938—and averaging that out and finding an average from 1933 to 1937, inclusive (not, it will be noticed, including 1938), of £700, which is nearly three times the profit which was actually made at the time when we have to consider
G what a prudent butcher would give for the premises. That seems to me a wholly fallacious way of approaching this problem. When the matter is properly considered, it appears evident that no butcher could reasonably be expected to offer a rental of £400 per annum for a business which appeared to be earning at the most, so far as one can tell, a profit of
H something like £300 per annum on a £200 per annum rent. That, as I say, is without regarding any increase in the extra rates attributable to the extra rent. The thing is absurd on the face of it, and I cannot accept the view of counsel for the respondents that this is a question of fact, and that the county court judge was powerless to deal with this matter as a matter of law, and that, in considering reasonableness, he

could say that it was unreasonable to expect that a hypothetical butcher would pay a rent which was almost certain to bring about insolvency.

I come to the conclusion that the judge was wrong, and the referee was wrong in the way in which he ascertained these profits, and that he ought to have looked at the financial position of this business as at the time when the application was made for a new lease, and to have considered then, and not to have gone back to 1933, what the real substantial nature of this business was. Had he done that, it would have been impossible, I think, for him, or for the judge, if he dealt with the matter properly, to have come to any conclusion but that, whatever else was certain, it was certain that the butcher would not be able to pay more for these premises than any other trader—namely, £375 per annum. Whether or not in fact he would have been able to pay that we need not speculate, because, if the fact is that he would pay no more than any other trader would pay, it follows, without any reference to any authorities whatever, or any consideration of principles, that there was here in fact no goodwill rent at all, and, therefore, no right to compensation, and, therefore, no right to a new lease.

There are, I may say, several other matters of criticism which may be directed to this report, but, for the sake of economy, I think that it is unnecessary myself to deal with them. It is sufficient for me to say that the profits of this business, on the face of it, show that these premises attracted no goodwill rent, and that the landlords are right in saying that, if they are called upon now to grant this new lease, they are called upon to give a present to the present tenant, which the statute does not require. In my opinion, this appeal should be allowed.

LUXMOORE, L.J.: I agree that this appeal must be allowed, and it is unnecessary to remit the case back to the county court judge for further hearing and consideration. The county court judge has confirmed the report of the referee, to whom the case was, in the first instance, sent for inquiry and report in accordance with the provisions of the Landlord and Tenant Act, 1927.

The two main points to which the reference was directed were (i) are the applicants entitled to any, and, if so, what, compensation in respect of the goodwill of the business of butchers carried on by them at No. 189, High Street, Chatham, on the determination of the lease under which they hold the premises from the respondents, who are the owners of the property, and (ii) if the applicants are entitled to compensation, are they entitled to claim that a new lease of the premises be granted to them, and, if so, on what terms should such new lease be granted?

The referee reported that the applicants were entitled to compensation in respect of the goodwill to the extent of £375, and that they were entitled, in lieu of having that sum paid to them by way of compensation, to have a new lease of the premises for the term of 14 years, with a right to break the lease at the end of the seventh year, at an annual rental of

£375, and subject to the usual repairing covenants, whatever that phrase may mean. The appellants have appealed from the order of the county court judge confirming the report, and they base their appeal on a number of different grounds. It is, I think, necessary to deal with only two of these objections. The first objection put forward is that the county court judge refused at the hearing before him to allow further evidence to be called with regard to an offer made by a third party, not a butcher, since the hearing before the referee. It was stated that this offer was at least equal to, if not better than, the rental reported by the referee, and accepted by the county court judge as being the rental any butcher would be willing to pay for the premises. The second point argued before this court was that, even if such evidence were properly excluded by the county court judge, the evidence upon which the referee reported, and the county court judge found, that the tenant was entitled to receive compensation to the extent of £375 did not support such a finding, and that, when the facts stated in the report were properly considered, the applicants were not legally entitled to any compensation whatever in respect of goodwill. As I have said, a number of other points were raised, but, having regard to the conclusion to which I have arrived, I need not deal with any of those points.

In order to ascertain what is the compensation to which a tenant is entitled under the Act, it is necessary to bear in mind that the goodwill referred to in the Act is not to be ascertained on the basis of the meaning usually attributed to the word "goodwill," for, as has been pointed out in cases which have arisen under the Act, the word "goodwill" is used in the Act in a restricted sense. In no reported case is the meaning of the word, for the purposes of the Landlord and Tenant Act, more clearly explained than in the illuminating judgment of MAUGHAM, L.J., in *Whiteman Smith Motor Co., Ltd.* v. *Chaplin* (1). MAUGHAM, L.J., pointed out that the limit of the tenant's compensation is the addition to the value of the premises in the hands of the landlord at the end of the tenancy, but that that addition must be the direct result of the carrying on of the trade by the tenant or his predecessors, and that any value attributable exclusively to the situation of the premises must be excluded, as also must be excluded any value due to an increase in population, or to any change of trading conditions, or to a shortage of suitable premises, or to other like conditions. In other words, the only kind of goodwill which can be an addition to the value of the premises in the hands of the landlord is that kind which has become attached to the premises, irrespective of their position, and which could naturally be reflected in a higher rent payable by a person carrying on a similar business. Then MAUGHAM, L.J., went on to point out that the profits due to the reputation of the proprietor or to the personal skill or ability of the persons or assistants employed in the business must be excluded, and he summed up the matter by saying, at p. 49:

> It follows that the real question to be answered is: What is the addition to the

> value of the premises in the hands of the landlord by reason of "the net adherent goodwill" [which **Maugham**, L.J., has defined] ?

Then he goes on to say, at p. 49 :

> This is in effect the same thing as saying that the compensation to which the tenant would be entitled is the difference, if any, between : (*a*) the value of the reversion if the landlord were to let the premises at the goodwill rent, i.e., for the purpose of the same business as that which the tenant has carried on, and (*b*) the value of the reversion if he let the premises at the normal rent.

The normal rent he had previously defined, at p. 47, as being the rent which :

> . . . "a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises, having regard to the terms of the tenancy, but irrespective of any goodwill which may have become attached to the premises" by reason of the trade or business of the tenant or his predecessors.

In the present case, the referee has purported to arrive at the normal rent and at the goodwill, and to deduct one from the other. If he arrived at these two rentals on a proper basis, I think it is probable that no question will arise with regard to his findings. The question is, has he done so ? He deals with this aspect in para. 13 of his report. He finds that the normal rent is £375 per annum, and probably, on the evidence before him, no substantial fault can be found with that finding. On the evidence before him, I should be prepared to agree entirely. He then proceeds to find that the goodwill rent is £400 per annum. He rejects the evidence of certain witnesses who gave evidence before him as to the rent they thought a butcher would pay, and he proceeds to fix the goodwill rental by a reference to the profits alleged to have been earned in the business for 1936, 1937, 1938, and the first seven weeks of 1939. It seems to me to find that these profits, which are the whole profits earned in the business, include all profits, whether arising from the situation of the premises or due to an increase in population, for no deduction whatever is attempted to be made from these profits on either of these heads, nor is any deduction made in respect of the tenant's reputation or the personal skill or ability of the employer in that business. The referee has merely taken an average of the profits stated, which, be it said, are ascertained without making any allowance in respect of the capital employed in the business. He states that he has arrived at the conclusion that a prudent butcher, who was considering leasing these premises, would agree to give an annual rental of £400 for the business, because the average profits, when the rental was £200 per annum, were, during the period to which I have referred, between £400 and £500 per annum. I can see no possible foundation for any such finding. First, the evidence shows that both the turnover and profits disclosed had fallen steadily year by year. In 1933, the turnover was £9,669 and the profit was £882, and, in 1938, the turnover was £7,262 and the profit was £242, a remarkably small rate of profit having regard to the turnover, and even smaller when it is remembered that no deduction is made in respect of the capital employed in the business.

During the whole of the period under consideration, the rent was £200 per annum, and the rates were paid on a rateable value fixed at £122 per annum. If the rent had been £400 per annum, the profits would clearly have been lessened by at least the increased rent and by the rates, which would quite plainly have been increased if the rental value had in fact increased to that extent. Thus, in 1938 there would plainly have been a loss. The profits to be considered would also be considerably reduced if a proper provision had been made for interest on capital. I can see no justification whatever under the Act for fixing the goodwill rental at £400 per annum. I think it is obvious that no prudent butcher would pay such a rent, since, by reason of that payment, such profits as are shown to have been earned when the rent was £200 per annum would disappear entirely. It is only by fixing the rent in the manner stated that the referee has arrived at the conclusion that the tenant is entitled to compensation, for he has deducted the normal rent of £375 from the £400 and he has capitalised the difference—namely, £25, on the basis of a 15-years' purchase. However, the rental of £400 has, in my judgment, been arrived at on the basis of the whole of the profits earned, without any attempt to distinguish between what is due to the situation or to personal skill, and it seems plain to me that the method adopted entirely disregards the principles enunciated by MAUGHAM, L.J., to which I have already referred. I am satisfied that, on the facts stated in the report, it is impossible to hold that any prudent butcher could be expected to give so large a rental as £375 per annum, and *a fortiori* £400 per annum, for the premises. If that is so, the whole foundation upon which the referee has built his argument topples to the ground, and the county court judge was not entitled to confirm the report. I am satisfied that the county court judge ought to have held that the applicants were not entitled to any compensation for goodwill, and he ought so to have found, and to have refused to direct the grant to the applicants of a new lease of the premises.

That would dispose of the case, but, as the question whether the county court judge ought to have allowed further evidence tendered by counsel for the respondents in the arbitration to be given, and to have considered it, was fully argued, and the question is one of general importance, I think it right to express my opinion with regard to it. In considering it, it is necessary to bear in mind the relationship of the referee and the judge. The judge is the tribunal, and though, in the large majority of cases, the Act provides that the matter shall be sent to a referee for inquiry and report, it is most important to remember that the referee has no power to determine anything. When the report comes before the county court judge, it comes before him as a new proceeding, and not as an appeal from the referee. Apart from any question under the Act, when judicial proceedings come for the first time before a court with authority to deal with the matters in question, it is the right of each party to submit to the court competent evidence germane to the issue to be determined, and the court has no power to exclude such evidence unless there is some statutory provision to the contrary. The Landlord and Tenant Act, 1927, s. 21, provides how proceedings in the county court are to be conducted. The tribunal is the county court. In subsect. (2), the proceedings in the county court, unless the parties otherwise agree, or it is otherwise prescribed—that means, according to the definition in sect. 24, prescribed by rules of the county court—shall be referred. In subsect. (4), there is a limit on the number of expert witnesses who may be called before the referee, unless the referee or the county court judge otherwise directs, and in subsect. (5) there is power to make county court rules regulating the proceedings. An interesting question arose whether this limited the rules to those made under the County Court Act, 1919, having regard to the verbiage of the Landlord and Tenant Act, 1927, s. 6, to the exclusion of those made under any subsequent County Court Act. Speaking for myself, I do not think it is necessary to decide this question, for, in my opinion, whichever set of rules is considered, the same answer must be given with regard to the right to submit further evidence at the hearing before the county court judge. Under the 1919 Act, the material rules are to be found in C.C.R., Ord. 20*a*. Under the 1934 Act, the rules are to be found in the present C.C.R., Ord. 19. Admittedly there is no express provision in any of the Acts or in any of the rules against further evidence being called when the matter is before the county court judge. One can see that there is an implied prohibition against any further evidence. I am entirely unable to appreciate that argument. For my part, I am satisfied that the inherent right of a litigant to submit relevant evidence to the court can only be taken from him by express statutory enactment or with express statutory authority. I can find no trace of either in the present case, and, if I had come to the conclusion contrary to that to which I have arrived on the first question, I should have had no hesitation in sending the matter back to the county court judge for the further evidence to be heard and considered, either by the county court judge, or, if he should in his discretion so decide, by the referee, whose report should in that case be remitted to him for further consideration, the final determination of the court still being, as it always must be in these cases, with the county court judge. I think this point has in fact been decided by this court in *Simpson* v. *Charrington & Co., Ltd.* (2). In that case, SCRUTTON, L.J., deals with the relationship of the county court judge to the referee. He points out what that relationship is. He says, at p. 76 :

> A motion to vary the report is necessary if it is to be challenged.

Counsel for the respondents has rightly pointed out that that is a slip, and that no motion is necessary, but, if one substitutes for the words " on such a motion " the words " on such hearing the judge is at liberty to adopt, vary or disregard a finding of the referee, or to hear fresh evidence on any point," I can see no possible ground on which exception can be taken to the slip. Indeed, so far as this court is concerned, I am satisfied that we are bound by such a finding, or, at any rate, would be bound to follow it, even if we disagreed with it. That view of the court, I think, is plain if one reads what GREER, L.J., said, at p. 83 :

> It is only for convenience that the matter is referred in the first instance to a referee for inquiry and report, but on receiving the report, if the rules of practice have been complied with, the county court is bound to exercise its own judgment on all questions of law or fact, and though it would be in most cases unwise for the county court judge to arrive at a conclusion different from that of the referee on the question as to the weight to be attached to the evidence of witnesses who have been heard and seen by the referee and have not been seen or heard by the judge, still it is to the judgment of the latter on all questions of law or fact that the statute refers the action.

In those circumstances, I am satisfied that the county court judge had no warrant in refusing to accept or consider the new evidence tendered before him at the trial. If, as I have said, I had come to a different conclusion on the first point, I should have had no hesitation in remitting the matter to the county court judge for the further evidence to be heard and considered. I agree that the appeal succeeds, and that the report of the referee should be varied by holding that the applicants were not entitled to any compensation for goodwill under the Landlord and Tenant Act, and were not, therefore, entitled to any new lease.

ATKINSON, J. : I agree. With reference to the point of counsel for the respondents that the county court judge had no power to hear further evidence, I merely add this. He concedes under C.C.R., Ord. 37, that, if the county court judge had given judgment first, and then there had been an application for a new trial on the ground that further relevant evidence had come to light, the judge would have had jurisdiction to order a new trial, yet he would drive us to the situation that, when counsel for the appellants asked the county court judge to hear this evidence, the judge had only to say, "I am satisfied that justice cannot be done without hearing this evidence, but I must give judgment against you first, and in five minutes you can apply for a new trial, which I will promptly order, so that this evidence can be admitted." I cannot think that the rules can really drive the court to such an absurd position.

On the main question, my difficulty is to see any justification whatever for the finding that the goodwill value was £400. There is no question now, I think, really, that there was evidence to support the finding that the ordinary market value of the rent was £375. There must be some evidence to justify a finding that the landlord could get more than that from a butcher. This report has to be dealt with as if it were the judge's judgment, and, if there was no evidence to support the finding, this court has power to interfere. The tenant had been paying only £200 per annum, and a new would-be tenant, a butcher coming along, would certainly ask him, first of all, what profits had been made. He wants to ascertain what he may expect to get himself, and the first thing to guide him, I imagine—and this is common ground—is the figures of his predecessor in business. The first thing which he would see would be that in 5 years the turnover had fallen by 25 per cent. steadily and continuously, and that the percentage of profit on the turnover had fallen from 9 per cent. to 3½ per cent. That would not be very encouraging, but, when he was ascertaining the profits which his predecessor had been A making, the first thing he would do (and this is quite apart from any question of law, but is merely what a business man would do) would be to discount those profits to some extent. He would know perfectly well that, when his predecessor had been there for 29 years, he could not hope to retain the whole business connection, and he would discount B those profits, and in doing that he would quite admittedly be doing what MAUGHAM, L.J., said in *Whiteman Smith Motor Co., Ltd.* v. *Chaplin* (1), at p. 50, had to be done :

> The tenant naturally starts by giving evidence as to the profits which he has earned from the business during the term. It is obvious that these profits form a C very slight guide to the value of the adherent goodwill, since they may depend largely or entirely on the skill, the reputation, or the personal qualifications of the person or persons who have carried on the business, or they may be attributable solely to the advantages of the site or to improved trade conditions. The preliminary questions for the referee are to determine on the evidence of surrounding circumstances and of experts whether there is any real goodwill, and what proportion, if any, of the profits [which the former man had made] may be expected to D accrue to a new tenant, carrying on the same business, by reason of the trade with old customers who will continue (on the assumption of reasonably good management) to come to the premises, and who would not naturally come there but for their previous visits.

In a moment, I think, I can point out conclusively that the whole structure built by the referee has been on an assumed figure of the profits E that the late tenant has made, without any discounting whatever, and he has never addressed his mind to the questions indicated there by MAUGHAM, L.J. When he had discounted the figures, as, I think, a business man would do, the next question he would ask is what capital he would want for running the business, and, of course, unless the profits F which he could expect to make exceeded the 4 per cent. or 5 per cent., there would be no goodwill about it, because he could get that by investing his money, without having to work for it. Those are the three problems, to my mind, to which any trader would address his mind—namely, see what the last man has done, and make up his mind to what G extent that ought to be discounted, see what capital would be necessary for running the business, and then see what he could afford to pay. To what extent have those considerations entered into the finding of the referee ? There is one other sentence I would like to point out in the judgment of MAUGHAM, L.J., at p. 51 : H

> This question must often be a very difficult one to answer otherwise than by an intelligent guess. When it has been answered by a finding, say, that profits of the extent of £X per annum may be expected to "adhere" . . .

I emphasise the words " may be expected." Now, one does not expect without there being reasons for expectation, guesswork or assumption.

It is very different, to my mind, from what was meant by MAUGHAM, L.J., when he used the expression "may be expected to 'adhere.'" What has the referee done when he has addressed his mind to this question? He first of all refers to Mr. Kemsley's evidence. Mr. Kemsley's evidence was that he would go to £400 per annum, or even £50 more, on the figures
A down to 1937. I think that the referee has found £400 on the figures arrived at with much more information than Mr. Kemsley had. I should have thought that evidence was tendered against the finding of £400. The referee continues as follows:

> The average for the last three completed years is £421.

B

I think there is a great deal of criticism, and justifiable criticism, to be levelled at taking an average where there is a steady fall and where the profits for the third of the three years were only a third of the first of the three years. At any rate, he says: "The average for the last three
C completed years is £421." Then the referee says:

> Suppose, as may well be, the profits remain for the future at about that average [which is what he wants].

Is the referee entitled to say, "Suppose, as may well be, the profits remain for the future at about that average"? That is on the average
D of what the last man has made, an average open to very serious criticism on my view, but, even apart from that, he has not proceeded to discount that £421, as MAUGHAM, L.J., said that he ought to do. He has not directed his mind at all to the question of what proportion of that average, even if it were a fair average on which to work, was likely to
E be retained by the new tenant, and he does not say, "I find as a fact that they may be expected for this reason, for that reason or for the other reason." He merely says, "Suppose, as may well be, the profits remain for the future at about that average," and then he proceeds to give some very good reasons why they should—namely, that the trouble
F which had led to the fall had probably come to stay. Still I cannot get away from the fact that this figure of £421 which is taken as his basis (i) is open to the criticism that he has not discounted it as he ought to have done, and (ii) is a figure which without any justification whatever he has assumed will be a guide to the future. It seems to me that it is
G very far from saying, in the words of MAUGHAM, L.J., that that figure might be expected to adhere to these premises. If you look at the figures for 1937, a profit of £396 less the further £200 for rent is £196, and, with the extra rates and interest on capital to the extent to which there has been in this case, would there have been anything left in it on
H those figures? For the next year—which is the last available year, 1938—there is obviously a hopeless loss. That was sought to be escaped from by saying that the first seven weeks of 1939 showed an increase, but no one took the trouble to compare the figures for the first seven weeks of this year with the corresponding period of last year or the year before. No real weight can be attached to those figures without a

relative comparison. We do not know at all, and the referee did not know at all, what the figures were for the relevant period in the previous years.

It seems to me that I have said enough to indicate why I think the respondents fail in this case, because I think that there was no justification whatever for the assumption that the profits were going to average about £420 per annum, and that, upon that assumption, any would-be butcher trader would be prepared to pay double the rent which his predecessor had been paying.

Appeal allowed with costs ; order of the referee rejected and ordered that no new tenancy be granted.

Solicitors : *Wood, McLellan & Williams* (for the appellants) ; *Wilfrid Ellis* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

SMITH *v.* SMITH.

[KING'S BENCH DIVISION (Hallett, J.), **November 3, 1939.**]

Land Drainage—Drainage rates—Owner's rate—Lease in which tenant covenants to pay " all rates, taxes and outgoings "—Owner's rate paid by tenant—Whether entitled to be recouped by landlord—Land Drainage Act, 1930 (*c.* 44), *ss.* 24 (2), 26 (4).

The plaintiff, in his capacity as the tenant of certain property, paid to certain drainage authorities certain owner's drainage rates, and in this action sued to recover them from the owner, his landlord. The terms of the tenancy were that the tenant should pay all rates, taxes and outgoings in respect of the premises, except tithe rentcharge and landlord's property tax. The tenancy agreement was dated Oct. 24, 1924, and it was contended that the particular burdens referred to could not include a burden imposed after the date of the agreement, as such a burden could not have been within the contemplation of the parties :—

HELD : the plaintiff was not entitled to be recouped in respect of the payment of these owner's drainage rates, as they were included in the meaning of the words " rates, taxes and outgoings."

[**EDITORIAL NOTE.** It was sought in this case to rely upon the decision in *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4), but it is pointed out that that case was not only not followed in *Lowther* v. *Clifford* (6), but also was expressly stated to be wrong. Therefore, the fact that these drainage rates were not in existence at the time when the tenancy agreement was made was no bar to holding that these owner's drainage rates were included in the meaning of the words " all rates, taxes and outgoings."

AS TO INCIDENCE OF DRAINAGE RATES, see HALSBURY, Hailsham Edn., Vol. 30, pp. 90-93, paras. 170-172 ; and FOR CASES, see DIGEST, Supp., Sewers and Drains, Nos. 469a-469c.]

Cases referred to :

(1) *Brewster* v. *Kidgell* (1698), Carth. 438 ; 31 Digest 297, *4421.*

(2) *Stockdale* v. *Ascherberg,* [1904] 1 K.B. 447 ; 31 Digest 305, *4489* ; 73 L.J.K.B. 206 ; 90 L.T. 111 ; *affg.,* [1903] 1 K.B. 873.

(3) *Mile End Old Town Vestry* v. *Whitby* (1898), 78 L.T. 80 ; 31 Digest 304, *4482.*

(4) *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (1903), 67 J.P. 402; 31 Digest 303, *4477.*

(5) *Lodge* v. *Lancashire County Council* (1934), 152 L.T. 167; Digest Supp.

(6) *Lowther* v. *Clifford*, [1927] 1 K.B. 130; Digest Supp.; 95 L.J.K.B. 576; 135 L.T. 200.

(7) *Harris* v. *Hickman*, [1904] 1 K.B. 13; 31 Digest 303, *4475*; 73 L.J.K.B. 31; 89 L.T. 722.

Action claiming the sum of £102 4*s.* 5*d.* as being drainage rates paid by the plaintiff in respect of property which he holds or held as tenant of the defendant. The facts are fully set out in the judgment.

Eustace Brightman (for *J. Roland Adams*, on war service) for the plaintiff.

Sydney G. Turner, K.C., and *Gordon Alchin* (for *H. E. R. Boileau*, on war service) for the defendant.

Hallett, J.: The basis of this claim is the Land Drainage Act, 1930, s. 26 (4) (*c*). For the purposes of this case, it is admitted by the defendant that the plaintiff did, in his capacity as the tenant of the property in question, and having that tenancy under an agreement in writing, dated Oct. 24, 1924, pay to certain drainage authorities what are conveniently called owner's drainage rates to the amount set out in the statement of claim. Under the Land Drainage Act, 1930, and by sect. 24 of that Act, a distinction is drawn between rates made by a drainage board which are therein described as "owner's drainage rates" and rates made by a drainage board which are therein described as "occupier's drainage rates," the distinction between the two being that owner's drainage rates are rates:

> . . . raised for the purposes of defraying expenses incurred in connection with new works or the improvement of existing works and charges in respect of contributions to be made by the board to a catchment board. . . .

Occupier's drainage rates are rates "raised for the purposes of defraying any other expenses or charges." There is a proviso in sect. 24 (2) which might conceivably be applicable to this case, but, in the view which I take on the rest of the matter, I do not think that I need consider that proviso.

As regards owner's drainage rates, by sect. 26 of the same Act they are assessed, equally with occupier's rates, upon the occupier of the hereditament. That appears from sect. 26 (4) (*a*) of the Act, and sect. 26 (4) (*b*) provides "that they may be recovered by the drainage board from the occupier." That is the machinery whereby owner's drainage rates can be recovered. Sect. 26 (4) (*c*) provides as follows:

> The occupier of any hereditament shall be entitled to recover from the owner thereof any amount paid by him on account of an owner's drainage rate. . . .

It is that right of recovery, so given by that statutory provision, of which the plaintiff in the present action seeks to avail himself.

There are two observations which I think I should make before I leave the words of that provision. In the first place, it will be noticed that the occupier is given a right of recovery. He is not given, as he was by certain former Acts to which I shall have to refer, merely a right of deduction from rent. I think that perhaps that distinction is of some importance in connection with the point of estoppel upon which the defendant relies. The second observation I want to make about that provision is that there is nothing in that subsection which expressly says that the right of recovery is to be enjoyed only in the absence of any agreement to the contrary. As I apprehend it, the principle is quite clear that any statutory right which is given to a person may be waived by him unless there is some statutory provision which prevents him from contracting out of the privileges conferred upon him, or unless there is in the statutory provision something of sufficient public importance to deprive him of the right of contracting out. Such provisions preventing him from contracting out can be found in various Acts of Parliament dealing with landlord and tenant. For instance, they exist in connection with the landlord's property tax, and they can also be found in the legislation dealing with the restriction of rents, while a further example is in the Landlord and Tenant Act, 1927. However, it is common ground in this case that there is nothing to be found, either in this Act of 1930 or in the preceding private Acts to which my attention has been drawn, which in any way deals with the question of contracting out so as to show that contracting out is prohibited and/or rendered nugatory. We therefore start with the position that, although by statute there is a right conferred upon the tenant to recover the amount of any owner's drainage rates paid by him, there is nothing in the statutory provision, and nothing, as far as I can see, in any principle of law, which prevents an occupier depriving himself of that right by his contract with his landlord, if he so pleases.

The next point which arises is this. It is said on behalf of the defendant that the tenant, the plaintiff, being at liberty to part with the right conferred upon him by these statutory provisions, has in fact done so, and, therefore, cannot now rely upon that right for success in this action. It is said on behalf of the defendant that the tenant has parted with his rights in two ways. First of all, it is said that he has parted with them by virtue of the express terms of the tenancy agreement under which he holds these premises, and therefore I turn to the agreement, which is dated Oct. 24, 1924. I turn, in particular, to cll. 2, 3 and 4. In cl. 3, it is said that the rent is to be £250 per annum. That clause does not contain anything with regard to the rent being free of deductions, but cl. 4 is as follows:

> The tenant to pay all rates taxes and outgoings due in respect to the said premises during the said tenancy except tithe rentcharge and landlord's property tax.

In my opinion, these drainage rates, as a mere matter of English, clearly fall within the words "rates taxes and outgoings." They are referred to as "rates" in the Act of 1930, and I think that that is the way in which these charges are usually referred to according to present-day practice. I observe that in the older Acts these drainage charges are referred to as "taxes," for some reason. I do not think that they are taxes in the ordinary sense of the term, and my attention has been directed to *Brewster* v. *Kidgell* (1), in which the true limitation of the word "taxes," according to its ordinary acceptance, is explained in a very interesting way. At any rate, even if the word "rates" is not apt to cover such charges, as I think that it is, and even although the word "taxes" is not apt to cover such charges—and I do not think that it is so apt—there is still to be considered the word "outgoings," a very large word indeed. I entertain no doubt whatever that drainage charges of this kind do fall within the words "all rates taxes and outgoings due in respect of the said premises" within the ordinary meaning of the English language.

Counsel for the plaintiff seeks to meet that difficulty by putting forward a contention that, although the words may be apt to include a particular burden, yet none the less they may not have the effect of imposing that burden if it can be shown that such a burden was not within the contemplation of the parties at the time they entered into the agreement in question. In support of that doctrine, he has drawn my attention to certain authorities. I feel bound to say that, before I had looked at any authorities at all, my own view of the matter—which, of course, may always be wrong—was such as I have since found expressed in a very clear way by SIR RICHARD HENN COLLINS, M.R., in *Stockdale* v. *Ascherberg* (2). The passage to which I refer is at p. 450, where SIR RICHARD HENN COLLINS, M.R., puts it in the following way:

> . . . if a tenant makes an agreement in perfectly clear and unambiguous terms that he will bear all outgoings, I do not see how we can throw aside the plain meaning of the language used, and introduce some limitation of that meaning, which it would be very difficult, if not impossible, to define.

I must say that I think myself that, where parties have recorded their mutual rights and obligations in plain and unambiguous language, it would be a very dangerous doctrine indeed to say that those rights and obligations should be construed in a different way by reference to what the court supposes to have been in the contemplation of the parties at the time when they chose to employ those words. However, counsel for the plaintiff strenuously argued that the doctrine had in fact been recognised, and he drew my attention to two cases, to which I shall refer shortly.

Before I leave the words of the clause, there is one further point to which I should draw attention, and it is this. The obligation "to pay all taxes rates and outgoings due in respect of the said premises during the said tenancy" is subject to an express exception—namely, "except tithe rentcharge and landlord's property tax." I think that, upon true principles of construction, where an obligation expressed in general terms is subject to an express exception, it is all the more difficult to imply a further exception beyond that which is expressed. The well-known maxim *expressio unius* appears to me to be very much in point in connection with such an attempt.

The first of the two cases to which counsel for the plaintiff has called my attention is *Mile End Old Town Vestry* v. *Whitby* (3). Looking at that case, which is quite shortly reported, one finds that WRIGHT, J., said, at p. 80:

> The defendant has agreed to bear all outgoings, but I should rather think that a rate of a new kind was not covered by a general agreement like that.

I do not think that I need read any more, because to my mind the crux of that decision is in those few words "a rate of a new kind." I do not think that it is necessary for me to consider whether or not, having regard to certain later decisions to which I am going to refer, that decision should be followed to-day. It is sufficient to point out that it applies purely to a rate of a new kind. It may be that, if the Act which is now the subject of consideration contained an imposition of a new kind, as, for instance, to take the suppositious case which I suggested, the imposition of a window tax, a thing which there has not been for many years, a different result would follow. The other case to which counsel for the plaintiff called my attention was *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4). That was a decision of FARWELL, J., sitting as an additional judge of the King's Bench Division. In that case, this doctrine that an obligation which may fall within the wording of a covenant may none the less be excluded by a consideration of what the parties contemplated at the time the covenant was entered into undoubtedly was acted upon and received the approval of the judge. *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4) might, I think, be not unfairly described as the corner stone of the edifice which counsel for the plaintiff proceeded so clearly and skilfully to erect.

Dealing with the first of those cases, I am quite satisfied that the drainage charges which are the subject of the present action were not rates of a new kind at all. I should have been very surprised if they had been, but it is not necessary for me to speculate about it, because counsel for the defendant has clearly demonstrated to me that they are merely the successors of rates which had been imposed long ago under certain private Acts. With regard to the Middle Level rates, there appears to have been a series of Acts. Counsel for the defendant has taken me through the material sections, but in substance, having regard to the provisions of the Middle Level Act, 1874, ss. 35, 36, the four rates which at that time had been imposed were consolidated. In each case, the rates were, in the first instance, assessed upon, and payable by, the occupiers, just as all the rates are under the Land Drainage Act, 1930, but the occupiers had the right to deduct them from the rent, as contrasted with the present right to recover them from the owner on whose behalf they have been paid. There are two distinctions between the old Acts and the present Act. One is that there is now a right of recovery, whereas formerly there was only a right of deduction. The other is that

formerly the rates were assessed upon an acreage basis, and now they are assessed upon the basis of rateable value. The actual machinery for the drainage of these areas under the new Act is quite different from that in the old Act, but, in substance, these rates are the successors of the old rates, and to describe them as a new kind of rate is absolutely
A inaccurate. Indeed, it is not entirely irrelevant to remind oneself that the very title of the Land Drainage Act, 1930, is "An Act to amend and consolidate the enactments relating to the drainage of land," and not "An Act to provide for the drainage of land and the levying of rates in connection therewith."

B There is one case of some interest which counsel for the defendant has cited to me, *Lodge* v. *Lancashire County Council* (5). I need not read any part of it, nor, indeed, refer to it, beyond saying that it affords further support for the view which, independently of such authority, I had already formed—namely, that this is not a rate of a new kind.

C *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4), upon which he places so much reliance, has, however, been expressly disapproved of by the Court of Appeal. This doctrine (if one may so call it) of cutting down the meaning of the words by reference to the supposed contemplation of the parties appears to have been germinating over a considerable period,
D and at one time I confess that it looked as though a very lusty plant were going to spring from the seed planted in some of the earlier cases. However, just as the plant was beginning to show more promise, as in *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4) (which was decided in 1903), it was nipped by a frost, and the frost is to be found in 1904 in *Stockdale* v.
E *Ascherberg* (2). In that case, the decision in *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4) was cited by counsel for the defendant, and counsel for the plaintiff was not called upon to argue. There is no mention of that decision in the short judgment of SIR RICHARD HENN COLLINS, M.R., but I should find it extremely difficult to reconcile that judgment with
F the continued subsistence of *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4) as an authority.

However that may be, the decision in *Stockdale* v. *Ascherberg* (2) has been followed since by a much more recent decision of the Court of Appeal in *Lowther* v. *Clifford* (6). It says in the headnote of the report that
G *Stockdale* v. *Ascherberg* (2) was applied and that *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4) and *Harris* v. *Hickman* (7) were not followed. That is, no doubt, putting it quite correctly, but it hardly conveys the full extent of the blow which the doctrine in *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4) received, because in that case SCRUTTON, L.J., and also
H SARGANT, L.J., said in express terms that the decision in *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4) was wrong. SCRUTTON, L.J., says, at p. 148:

> In my view the decision of FARWELL, J., in *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4), followed by WRIGHT, J., in *Harris* v. *Hickman* (7) to the contrary effect, was erroneous.

In the same case, SARGANT, L.J., says, at p. 149:

> I may add that I agree with the learned judge in his view that *Valpy* v. *St.*

Leonard's Wharf Co., Ltd. (4) and *Harris* v. *Hickman* (7), which followed it, are contrary to the general current of authority and cannot be relied on.

I am not at liberty to follow *Valpy* v. *St. Leonard's Wharf Co., Ltd.* (4) even if I want to do so, and in fact I never have wanted to do so.

That deals with that part of the case. Then the other aspect of the case really becomes superfluous. The second point raised on behalf of the defendant was that, even if the claim were otherwise a good one, it was not open to the plaintiff to pursue it, by reason of the fact that there had been an earlier action between the same parties in which the present plaintiff was the defendant and the present defendant the plaintiff, which action was decided by SINGLETON, J. I have had put before me the pleadings in that action and the transcript of the shorthand notes of the judgment delivered in that action by SINGLETON, J. I do not propose to discuss that aspect of the matter at length, because it is immaterial, having regard to the view which I take on the first point, but, as the matter has been argued, perhaps it is right that I should express my view about it.

I am not satisfied that there is any estoppel in this case. The first action was an action in which the present defendant claimed rent, and, in order to succeed in that action, he had to show that the contractual rent in respect of the material period was £125 per annum, and not, as was urged by the plaintiff, £100 per annum. It was common ground that, if it was £125 per annum, to the extent of the difference between £125 and £100, less a small sum of £6, it had not been paid. Therefore, there was really only one issue in that case—namely, was the contractual rent over the material period £125 or £100? That issue was decided adversely to the defendant, the present plaintiff, by SINGLETON, J., upon the evidence, and thereupon he gave judgment for the difference, with costs, and that was his decision. In the present case, there is made by the plaintiff a claim based upon the provision in the Act of 1930 to which I have already referred. He is not bound, under the present statutory provision, to make his claim merely by way of deduction. If he had made his claim by way of deduction, there would obviously have been difficulties in his way, but it is a separate and independent claim to be recouped that amount. In those circumstances, I do not think that the mere fact that he failed to set off that claim in the previous action estops him, by reason of any of the authorities to which I have been referred, from raising it now.

However, this question of whether or not the fact that a claim in a second action could have been the subject of a set-off in an earlier action prevents the second action being brought is one of general importance. I do not think it ought to be decided except upon a very full consideration of the argument, and, whilst I have thought it right to indicate my present view, I would rather not express a final opinion upon it, because I think that it is undesirable that I should purport to decide questions of general importance which are not really necessary for the decision of the present case. I prefer to decide this case upon the first point only, whilst expressing my views *obiter* upon the second point, which I find an extremely interesting one. There will be judgment for the defendant with costs.

Judgment for the defendant with costs.

A Solicitors: *Smiles & Co.*, agents for *Welchman, Dewing & Wace*, Wisbech (for the plaintiff); *Lee, Ockerby & Co.*, agents for *Whittome & Co.*, Wisbech (for the defendant).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

B

NEWSTEAD *v.* LONDON EXPRESS NEWSPAPER, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and du Parcq, L.JJ.), **November 2, 3, 6, 7, 20, 1939.**]

C *Libel—True statement about existing person of same name as plaintiff—Whether referable also to plaintiff.*

Practice—New trial—When ordered—Smallness of damages jury can possibly award.

The plaintiff, Harold Newstead, was a hairdresser at Camberwell. He was about 30 years of age and unmarried. The defendants published D photographs of two women with a statement underneath that Harold Newstead, a 30-year-old Camberwell man, had been convicted of bigamy. The plaintiff contended that these statements were understood to refer to him, though in fact they referred to another man of the same name living in Camberwell. At the trial, the jury failed to agree on the first of 5 questions left to them, asking them whether reasonable persons would understand the words complained of to refer to the plaintiff. E The jury returned written answers to the other 4 questions. It was contended that the evidence did not justify the jury in finding that reasonable persons would have understood the words complained of to refer to the plaintiff, as the words were not capable of such a meaning, and also that, assuming that the words were capable of a meaning defamatory of the plaintiff, the fact that they were true of F another person afforded a good defence:—

HELD (*per* SIR WILFRID GREENE, M.R., and DU PARCQ, L.J.): (i) the case was properly left to the jury.

(ii) the fact that certain words are true of one person does not in law make it impossible for them to be defamatory of another.

(*per* MACKINNON, L.J.): the appeal should be allowed by reason of the smallness of the damages which would have been awarded had G the jury found for the respondent on the first question submitted to them.

Decision of HAWKE, J. ([1939] 3 All E.R. 263) *affirmed.*

[EDITORIAL NOTE. Apart from the subsidiary questions arising here upon the practice of trials by jury, the main discussion is upon the principle established in *Hulton (E.) & Co.* v. *Jones* (1). The distinction between that case and the present H is that there the person intended to be referred to was a fictitious person, while here the person intended to be referred to was an existing person, and the statements made, if they referred to him, were substantially true. It is found impossible to make any distinction on the facts, however, and the principle of the earlier cases is held to apply to the present. MACKINNON, L.J., has not found it necessary to dissent from the main point for decision, but expresses grave doubt upon it. He bases his decision upon the point that, having regard to the small amount of damages that a jury could properly award in this case, it ought not to be sent back for a new trial.

As to Necessity for Statement to refer to Plaintiff Personally, see HALSBURY, Hailsham Edn., Vol. 20, pp. 395, 396, paras. 483-485; and for Cases, see DIGEST, Vol. 32, pp. 15-17, Nos. 46-77.]

Cases referred to: A

(1) *Hulton (E.) & Co.* v. *Jones*, [1910] A.C. 20; 32 Digest 17, *77*; 79 L.J.K.B. 198; 101 L.T. 831; *affg.*, [1909] 2 K.B. 444.

(2) *Derry* v. *Peck* (1889), 14 App. Cas. 337; 35 Digest 27, *185*; 58 L.J.Ch. 864; 61 L.T. 265; *revsg.* (1887), 37 Ch.D. 541.

(3) *Poliakoff* v. *News Chronicle, Ltd.*, [1939] 1 All E.R. 390; Digest Supp.

(4) *Nevill* v. *Fine Art & General Insurance Co.*, [1897] A.C. 68; 32 Digest 72, *1010*; 66 L.J.Q.B. 195; 75 L.T. 606. B

(5) *Cassidy* v. *Daily Mirror Newspapers*, [1929] 2 K.B. 331; Digest Supp.; 98 L.J.K.B. 595; 141 L.T. 404.

(6) *Watt* v. *Watt*, [1905] A.C. 115; 32 Digest 166, *2020*; 74 L.J.K.B. 438; 92 L.T. 480.

(7) *Marsh* v. *Isaacs* (1876), 45 L.J.Q.B. 505; 30 Digest 249, *490*. C

(8) *Cooper* v. *Oldham Chronicle* (1931), Unreported. Dec. 1.

(9) *Bruce* v. *Odhams Press, Ltd.*, [1936] 1 K.B. 697; [1936] 1 All E.R. 287; Digest Supp.; 105 L.J.K.B. 318; 154 L.T. 423.

(10) *Thomson & Co.* v. *McNulty* (1927), 71 Sol. Jo. 744; Digest Supp.

(11) *Shaw* v. *London Express Newspaper Ltd.* (1925), 41 T.L.R. 475; 32 Digest 15, *57*. D

(12) *Lord* v. *Croydon Advertiser* (1935), *The Times, Mar.* 2, 1935.

(13) *Lee* v. *Wilson & Mackinnon* (1935), 51 C.L.R. 276; Digest Supp.

(14) *Daines & Braddock* v. *Hartley* (1848), 3 Exch. 200; 32 Digest 60, *883*; 18 L.J. Ex. 81; *sub nom. Danes* v. *Hartley*, 12 L.T.O.S. 271.

(15) *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T.L.R. 581; Digest Supp. E

(16) *Sun Life Assurance Co. of Canada* v. *Smith (W. H.) & Son, Ltd.* (1933), 150 L.T. 211; Digest Supp.

(17) *Capital & Counties Bank* v. *Henty* (1882), 7 App. Cas. 741; 32 Digest 21, *121*; 52 L.J.Q.B. 232; 47 L.T. 662.

(18) *Hanson* v. *Globe Newspaper* (1893), 159 Mass. Rep. 273.

(19) *Peck* v. *Tribune Co.* (1909), 214 U.S. 185. F

(20) *Laroque* v. *New York Herald* (1917), 220 N.Y. 632.

(21) *Washington Post* v. *Kennedy* (1925), 3 Fed. (2nd) Rep. 256.

(22) *Tolley* v. *Fry (J. S.) & Sons, Ltd.*, [1931] A.C. 333; Digest Supp.; 100 L.J.K.B. 328; 145 L.T. 1.

Application by the defendants for judgment or new trial on appeal G from a verdict and judgment at the trial before Hawke, J., and a common jury, dated Apr. 21, 1939, and reported [1939] 3 All E.R. 263, where the facts are fully set out.

G. O. Slade, for the appellants.

A. T. Denning, K.C., and *Roy M. Wilson* for the respondent. H

Slade: The question involved is whether or not the decision in *Hulton (E.) & Co.* v. *Jones* (1) applies to a real as well as to a fictitious person. I rely upon the decision of Talbot, J., in *Cooper* v. *Oldham Chronicle* (8) and the judgment of Farwell, L.J., in *Hulton (E.) & Co.* v. *Jones* (1). The appellants admit publication of the matter complained of, but they deny the innuendo. The words were published of an existing person, and they were intended to refer to him. The words did not refer to the respondent. There were witnesses who said that they believed the words referred to the respondent. It will be a question as to whether or not they were reasonable persons, and that is a question of law. In *Hulton (E.) & Co.* v. *Jones* (1), FARWELL, L.J., said that the *de facto* intention required is a legal intention, and that what creates liability is the motive judged from the circumstances. There is a distinction between *Cassidy* v. *Daily Mirror Newspapers* (5) and the present case. In *Cassidy's* case (5), the libel could have referred to no one but the plaintiff's husband. In the present case, there is nothing beyond the mere mention of a name. Where words are published which are true of an existing person, and are proved to be true of an existing person, no action will lie at the suit of another person, even if that other person does satisfy the jury that the words were reasonably understood to refer to him, because intention is the essential element in the law of libel. The intention need not be the *de facto* intention of the writer, and, indeed, the *de facto* intention of the writer makes no difference. The intention to be considered is legal intention, and that is to be found by a consideration of two things—namely, the words used, and the circumstances in which they were published. One can reconcile the decision of the House of Lords in *Hulton (E.) & Co.* v. *Jones* (1) to the judgment of FARWELL, L.J., by saying that, when the relevant circumstances are shown to include proof that the words complained of are true of an existing person of the name used, or corresponding to the description used, in the alleged libel, the legal intention to refer to the plaintiff is excluded. That is, the *de facto* intention is eliminated. Also, in the absence of recklessness on the part of the publisher of the libel complained of, a person is not liable to pay damages to a plaintiff in respect of a publication which is aimed at an existing person and proved to be true of that existing person, even though all the acquaintances of the plaintiff fit the cap upon him. No one can reasonably assume that the plaintiff is hit, unless there is some statement which particularly or directly points to the plaintiff. *Bruce* v. *Odhams Press, Ltd.* (9) shows that there must be something in the circumstances to connect the plaintiff with the alleged libel. Unless there is something in the true words which apply more particularly to the plaintiff than to the actual person, there is no case to go to the jury. *Bruce* v. *Odhams Press, Ltd.* (9) also shows that it is necessary to plead facts from which reasonable persons would believe that the words referred to the plaintiff. In the present case, no facts have been elicited which would justify the putting of the question: "What do you understand by the words used?" There is no reported case of a true statement having been held to constitute an actionable libel, so far as the English courts are concerned. In any event, there was no case to go to the jury upon the traverse. Also, there was no case to go to the jury upon the confession and avoidance, because the facts were admitted to be true. [Counsel referred to *Thomson & Co.* v. *McNulty* (10), *Shaw* v. *London Express Newspaper, Ltd.* (11), *Lord* v. *Croydon Advertiser* (12), *Lee* v. *Wilson and Mackinnon* (13), *Cassidy* v. *Daily Mirror Newspapers* (5), *Bruce* v. *Odhams Press, Ltd.* (9) and *Daines & Braddock* v. *Hartley* (14).]

Denning, K.C.: The words were capable of referring to the respondent, A in the view of the persons who gave evidence. The matter was a question for the jury. Other newspapers contained a fair and accurate report. The appellants' newspaper did not. The harm done to the respondent is the same whether or not the words are true of another. The appellants were entitled to publish a fair and accurate report, but they did not do so. B It is not pleaded that this is a fair and accurate report. One must ascertain the meaning of the words and then say if the meaning is true. The question then arises: Is it the meaning which the writer intended, or the meaning as understood by the witnesses? A libel consists of the publication, without lawful excuse, of words which, in the meaning C reasonably put upon them by some of the persons to whom they are published, have a tendency to lower the reputation of the person referred to, no matter whether or not that meaning was intended. The fact that the writer did not intend to refer to the person who suffers is by itself no excuse. Nor is the fact that the words are true of another person D by itself any excuse. The logical consequence of *Hulton (E.) & Co.* v. *Jones* (1) is that a defendant is liable even though the words are true of a person other than the plaintiff. If a writer were given the address and the occupation of the person about whom he was writing, and those particulars were omitted, although the writer knew of the importance E of identifying the man, the writer might know that the words might refer to others. The gist of a libel is the injury to the plaintiff. All the authorities seem to agree that negligence carries liability with it. [Counsel referred to *Cassidy* v. *Daily Mirror Newspapers* (5), *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.* (15), *Sun Life Assurance Co. of* F *Canada* v. *Smith (W. H.) & Son, Ltd.* (16), *Capital & Counties Bank* v. *Henty* (17), *Hanson* v. *Globe Newspaper* (18), *Peck* v. *Tribune Co.* (19), *Laroque* v. *New York Herald* (20), *Washington Post* v. *Kennedy* (21), *Lee* v. *Wilson & Mackinnon* (13) and *Tolley* v. *Fry (J. S.) & Sons, Ltd.* (22), and to POLLOCK ON TORTS, 4th Edn., p. 200, WINFIELD ON TORTS, pp. G 278, 281, 285-287, SALMOND ON TORTS, 9th Edn., pp. 402, 410, and GATLEY ON LIBEL AND SLANDER, 2nd Edn., pp. 125, 126.]

Slade, in reply: In *Hulton (E.) & Co.* v. *Jones* (1), each of the Lords said that intention of some kind is material. They all eliminated *de facto* intention. The only other possible intention is assumed intention. The H whole basis of the decision in *Hulton (E.) & Co.* v. *Jones* (1) is that one cannot cast firebrands about and then say that one has been speaking in levity, and thus escape liability if the plaintiff has been injured. *Washington Post* v. *Kennedy* (21) is the converse of the present case. *Cooper* v. *Oldham Chronicle* (8) was decided on the ground that the words complained of were not reasonably capable of a defamatory meaning. In the present case, the name and the age of the person referred to were not the same as the name and the age of the respondent. There was also the fact that he was described as a Camberwell man. It would not be the act of a reasonable person to put it higher than to say that he might be the man. However, as LORD HALSBURY, L.C., said in *Nevill* v. *Fine Art & General Insurance Co.* (4), it is not sufficient to say that the words might be understood by somebody in a defamatory sense. In the present case, there was no case to go to the jury, because the words complained of were incapable of being understood by reasonable persons to apply to the respondent. The appellants have published a true statement, and that cannot be the subject of an action for libel.

SIR WILFRID GREENE, M.R.: I have read the judgment about to be delivered by DU PARCQ, L.J. Agreeing as I do with his conclusions, and the reasons which he has given for them, I do not think it necessary to deal at length with the case, but I wish to offer some observations of my own upon one crucial matter, which was much discussed before us.

Great reliance was placed by counsel for the appellants upon the language used by FARWELL, L.J., in his judgment in *Hulton (E.) & Co.* v. *Jones* (1). It is not surprising that he should have done so, in view of the fact that, when that case reached the House of Lords, two out of the four noble and learned Lords who heard the appeal (LORD ATKINSON and LORD GORELL) expressed their "substantial concurrence" with that judgment. At the same time, LORD ATKINSON and LORD GORELL expressed their concurrence with the opinion of LORD LOREBURN, L.C., whose reasoning I find it impossible to reconcile with much of what was said by FARWELL, L.J. In these circumstances, I am constrained to regard the reasoning of LORD LOREBURN, L.C., as representing the real *ratio decidendi* of the majority of the House, and the opinion of the other noble and learned Lord, LORD SHAW, does not differ from it in any important particular. It is to be observed that the opinions of the members of the House were not on that occasion considered opinions. If they had been, the language of LORD ATKINSON and LORD GORELL in relation to the judgment of FARWELL, L.J., would no doubt have been more explicit. I think it right to state my views upon this matter, as the expressions in question have given rise to much doubt and controversy.

There are two passages in the judgment of FARWELL, L.J., upon which counsel for the appellants strongly relied. One is at p. 480, where FARWELL, L.J., says:

> But it is not enough for a plaintiff in libel to show that the defendant has made a libellous statement, and that the plaintiff's friends and acquaintances understand it to be written of him: he must also show that the defendant printed and published it of him; for if the defendant can prove that it was written truly of another person the plaintiff would fail.

The other passage is as follows, at p. 481:

> If the libel was true of another person and honestly aimed at and intended for him,

> and not for the plaintiff, the latter has no cause of action, although all his friends and acquaintances may fit the cap on him.

It is important to examine carefully the process of reasoning of which these passages form part. At p. 480, FARWELL, L.J., expresses his agreement with the view which had been expressed by FLETCHER MOULTON, L.J., as to the necessity of the presence of an intention on the part of the defendant to refer to the plaintiff. That view is summarised by FLETCHER MOULTON, L.J., at p. 464 :

> It is, therefore, to my mind, settled law that a defendant is not guilty of libel unless he wrote and published the defamatory words "of and concerning the plaintiff "—in other words, unless he intended them to refer to the plaintiff.

Then FARWELL, L.J., says that the point of difference between himself and FLETCHER MOULTON, L.J., lies in the meaning of the word "intended," and states—correctly, if I may respectfully say so—at pp. 480, 481 :

> . . . the inquiry is not what did the defendant mean in his own breast, but what did the words mean having regard to the relevant surrounding circumstances . . . So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individual, but also when he has made a statement concerning a man by a description by which the plaintiff is recognised by his associates, if the description is made recklessly, careless whether it hold up the plaintiff to contempt and ridicule or not . . . The element of intention, which is as essential to an action of defamation as to an action of deceit, can be proved in the same way in both actions.

He had previously referred to the fact that fraud is committed where a representation is made [p. 480] :

> . . . recklessly, careless whether it be true or false, and although there was no intention to cheat or injure the person to whom the statement was made—*Derry* v. *Peek* (2)—and yet the fraudulent intent is of the essence of the action.

It would be affectation to say that in criticising the reasoning of so learned a judge I speak with hesitation, since my view upon the matter is clear. It appears to me that the analogy of the action of deceit is not a true analogy. In that action, the necessity for the presence of a fraudulent intention is satisfied if it be shown that the defendant made the statement in question recklessly, careless whether it were true or false. This recklessness and this carelessness, however, have nothing to do with the meaning of the statement. They are relevant only to the question of the fraudulent intent of the person making it. However, in applying the analogy to the case of libel, FARWELL, L.J., applies the test of recklessness to the meaning of the words used, which is quite a different matter. If the words used, when read in the light of the relevant circumstances, are understood by reasonable persons to refer to the plaintiff, then refer to him they do for all relevant purposes. Their meaning cannot be affected by the recklessness or honesty of the writer.

I do not propose to refer to the authorities which establish this proposition, except to quote the words of LORD LOREBURN, L.C., in *Hulton (E.) & Co.* v. *Jones* (1), at p. 23 :

> What does the tort consist in ? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it.

In the case of libel, once it is held that the words are capable of referring to the plaintiff, it is, of course, for the jury to say whether or not they do so refer. Subject to this, the principle is in truth an illustration of the rule that the author of a written document is to be taken as having intended his words to have the meaning which they convey when under-
A stood in the light of the relevant surrounding circumstances. In the case of libel, the same words may reasonably convey a different meaning to each of a number of different persons or groups of persons, and so be held to be defamatory of more persons than one.

After giving careful consideration to the matter, I am unable to hold
B that the fact that defamatory words are true of A makes it as a matter of law impossible for them to be defamatory of B, which was in substance the main argument on behalf of the appellants. At first sight, this looks as though it would lead to great hardship, but the hardships are in practice not so serious as might appear, at any rate in the case of state-
C ments which are *ex facie* defamatory. Persons who make statements of this character may not unreasonably be expected, when describing the person of whom they are made, to identify that person so closely as to make it very unlikely that a judge would hold them to be reasonably capable of referring to someone else, or that a jury would hold that they
D did so refer. This is particularly so in the case of statements which purport to deal with actual facts. If there is a risk of coincidence, it ought, I think, in reason to be borne, not by the innocent party to whom the words are held to refer, but by the party who puts them into circulation. In matters of fiction, there is no doubt more room for hard-
E ship. Even in the case of matters of fact it is no doubt possible to construct imaginary facts which would lead to hardship. There may also be hardship if words, not on their faces defamatory, are true of A but are reasonably understood by some as referring to B, and, as applied to B, are defamatory. Such cases, however, must be rare. The law as
F I understand it is well settled, and can be altered only by legislation. The appeal must be dismissed with costs.

MACKINNON, L.J.: The arguments in this case have ranged over a wide field, and we have been referred to many authorities. I do not
G propose to examine those many cases, but I propose to state the conclusions as to the law as to which I have arrived after examining them.

First, if A publishes to another person or persons words which upon their reasonable meaning refer to B, then, if those words are defamatory as holding B up to hatred, ridicule, or contempt, and if the words so
H referring to B cannot be justified as true, A may be liable for damages to B. Secondly, the reasonable meaning of the words, upon the question whether they refer to B, must be tested objectively, and not subjectively. The question is what do the words mean as words, not what did A in his own mind mean by them or intend them to mean. Thirdly, A cannot plead as a defence that he was unaware of B's existence. Fourthly, A

cannot plead as a defence that the words are, in their reasonable meaning,
equally capable of referring to C, and that, when referring to C, they
are true. Fifthly, there has been reference in some of the cases (notably
by FARWELL, L.J., in *Hulton (E.) & Co.* v. *Jones* (1)) to negligence or
recklessness on the part of A in making the publication. If the words,
on their reasonable meaning, do refer to B, I think it is immaterial whether A
A was either negligent or reckless in not ascertaining the existence of B,
or guarding against the applicability to him of the words. If B establishes
his claim, in assessing his damages the jury may take into account all
the circumstances of the publication. The negligence or recklessness of
A may well be among such circumstances. Further or otherwise, negli- B
gence or recklessness on the part of A is immaterial. It is hardly
necessary to add, sixthly, the rule, which is elementary—namely, that it
is the primary duty of the judge to decide whether the words complained
of are capable of a meaning that is defamatory of B and only if he answers
that question in the affirmative to leave to the jury the question whether C
or not they are in fact defamatory of B, and, if so, what damages he shall
be awarded.

In a case in which there is no question that the words are defamatory
of him, if they refer to B, and the contest is only whether they do so refer,
this preliminary question for the judge must be: "Are these words on D
their reasonable meaning capable of referring to the plaintiff?" If the
judge answers that affirmatively, I think that, properly, the first question
to be left to the jury must be: "Could the words used by the defendant
be reasonably interpreted by those to whom they were published as
referring to the plaintiff?" E

On the first question—not exactly in that form—that was left to them
the jury failed to agree. Counsel for the defendants submitted that
there was no evidence fit to go to the jury on which they could properly
answer this first question in the affirmative. The judge overruled this
contention. He therefore said that the case must be left for trial by F
another jury, if the plaintiff chose to enter it again for trial. The
defendants appeal from this ruling, though they also raise other contentions
in law, some of which I have previously dealt with adversely
to them. In my opinion, the question for us is whether the judge was
right in ruling that there was evidence fit to be left to the jury on which G
they could reasonably answer "Yes" to the question: "Could the words
used by the defendants be reasonably interpreted by those to whom they
were published as referring to the plaintiff?" In form this may not be
precisely the same as the preliminary question for the judge's determination—namely,
"Are the words capable of being defamatory of the H
plaintiff?"—but I think that the difference is one of form and not one
of substance, for I think that truly the preliminary question for the
judge is: "On the evidence, is it possible for a reasonable jury to answer
the above question affirmatively?"

My brethren are of opinion that the judge's ruling as to this was correct.

I confess that I entertain grave doubt as to whether it was. That doubt is not sufficient to make me express an actual dissent, especially as I think there is another ground on which this appeal should be allowed, but I should like to indicate the reasons which make me doubt. In considering the judge's preliminary question whether the words are capable of being defamatory, and whether he ought therefore to leave to the jury the question whether they are so, what type of mind or intelligence ought the judge to impute to the audience? Not, I think, that they are of the class who accept and act on the wickedest proverb that was ever invented—namely, "There is no smoke without fire." On the other hand, perhaps he should not impute to them the charitable decency of gentlemen. I can only suppose that one must have recourse again to that elusive being "the reasonable man," and assume that the audience consists of "reasonable people." Secondly, in considering what is the reasonable meaning of words uttered, not merely the actual words, but also the circumstances of time and place must be taken into account, and also the constitution of the audience to whom they were addressed.

The audience of a general newspaper is the general public. Words in such a paper may have a meaning other than they may have in a local paper addressed to a local audience, and words in a letter addressed to a few people, or even to an individual, may have a still more special signification. I would suggest as the two extremes of generality and speciality (*a*) a paragraph in THE TIMES, "John Smith of London was convicted at the Old Bailey of so-and-so," and (*b*) a letter to a householder at his address, "I think it right to let you know that your gardener, A.B., is stealing your vegetables and selling them to the local greengrocer." It seems manifest that THE TIMES could not be successfully sued by a John Smith who was not the convict, and equally manifest that, if the letter were untrue, the gardener could sue the writer.

If a newspaper printed the sentence, "A. L. Smith, a London man, was fined for drunkenness at Bow Street," and a man of that name alleged these words to be defamatory of him, I think that clearly the judge ought not to let his case go to the jury. If, however, forty years ago, a man exhibited a poster at the gate of Balliol, or outside the Law Courts, bearing the words "A. L. Smith fined for drunkenness," either of two distinguished people, if they cared to sue, should have had their cases left to the jury. The words published to the audiences—undergraduates of Balliol, or lawyers leaving the courts—would have a special meaning.

In *Hulton (E.) & Co.* v. *Jones* (1), the nature of the audience may have had some minor importance. The plaintiff was a well-known barrister on the North Wales and Chester Circuit, and that is a region not far from Manchester. The sting of the words in that case, however, arose from his very unusual name. In all probability there was only one Artemus Jones in Great Britain, possibly in the world. If the paper had written of the doings at Dieppe of John Jones, I am clear that not one of the many men who struggle through life under the name John Jones ought to have had a claim left to the jury, and, if the article had said Jones *simpliciter*, neither Mr. Artemus Jones nor any other Jones could have sued.

If the words may have a special significance to the audience by reason of some local or other circumstance, how far is the special knowledge of some members of that audience to be considered in estimating the reasonable meaning of the words to those members ? If the audience be a local one—for example, if the words in this case had been printed in a Camberwell newspaper—the percentage of readers who knew of the existence of the plaintiff might have been much greater than the percentage of readers of the MANCHESTER GUARDIAN, if I may assume, solely for the sake of argument, that that austere journal could ever have printed this trash. In *Hulton (E.) & Co.* v. *Jones* (1), every reader (except those who thought the name merely fictitious, or did not think about it at all) would reasonably think that the reference was to the plaintiff. It was in evidence in that case that the plaintiff was baptised Thomas Jones, and had only assumed the name Artemus when he came to years of discretion. If the position had been reversed, and he had dropped the name Artemus when a boy, and had sued Hulton, saying, " My real name is Artemus. I have not used that *prænomen* for many years, but I can call one of my schoolfellows and an aunt who will say they once knew me as Artemus, and, being disagreeable and suspicious people, will say they thought this story of peccadillos at Dieppe referred to me," I think he should have been non-suited.

There is implicit also this further consideration. If the special knowledge of a section of the audience consists only of their personal acquaintance with the plaintiff, and if he is a man of good character, he needs all the less any protection from any imputation on that character in their minds, if they are reasonable people. The better his character, the more likely are those who know of him (unless they are unreasonably uncharitable) to say, " As usual, when one knows anything of one's own knowledge, a newspaper gets it wrong." Indeed, the smaller the percentage of the specially informed part of the audience, and the higher the character of the plaintiff, the more remote is the possibility of any real damage to him from the suggested defamation.

On the facts of this case, (*a*) the audience to whom the words were published was very widespread and numerous, while the percentage of it with special knowledge—that is to say, with acquaintance with the plaintiff—was infinitesimal, and (*b*) the name Harold Newstead is a very ordinary one, and may well be owned by more than one person. As the question is whether the few people who knew of the plaintiff would be acting as reasonable people in thinking, without further inquiry, that the words referred to the plaintiff, and at once holding him in ridicule, hatred, or contempt, I confess that, unassisted by the view of my brethren, I should be inclined to answer in the negative. I should be inclined to think that they could do so only if they were more stupid and more uncharitable than I hope reasonable people are.

There is, however, another and different ground on which I think this appeal should be allowed. We are encouraged and entitled to assume A that any jury consists of twelve reasonable people, though, paradoxically, tradition forbids us to interfere when a jury has assessed damages at a figure that we all think extravagantly excessive. In this case, the jury did assess the damages, if the words did defame the plaintiff, at one farthing. It is true that they did not bring in a complete verdict, since B they failed to agree on the first question, but they expressed their unanimous opinion as to the amount of damages. I suppose I am still entitled to regard them as twelve reasonable people, even if they failed to agree on a question which has virtually caused disagreement between my brethren and myself. I know, therefore, that twelve reasonable C people have assessed the plaintiff's possible damages at one farthing, and, on the facts proved, I cannot conceive that any other twelve reasonable people would arrive at a larger figure.

It is said that we are bound to permit, if not to direct, a further trial of this case, and, if another jury disagrees, then yet another, and D so on. That is in order that eventually some jury may answer the first question in the negative, or, answering it in the affirmative, may give the plaintiff the farthing upon which one jury has already agreed, and upon which I am satisfied any reasonable jury would agree. I do not think that we are constrained to adopt this course, for I think that we sit here E to administer justice, and not to supervise a game of forensic dialectics. This ground, on which I would allow this appeal, is similar to that which was applied by this court in *Poliakoff* v. *News Chronicle, Ltd.* (3), though with a slight, but, as I think, an immaterial, extension, for in that case the court was made aware of the fact that, the only conceivable damages F being one farthing, the defendants had paid into court a sum in excess of that figure.

DU PARCQ, L.J.: The submissions upon which the appellants rely may be stated shortly as follows. (i) The evidence would not have justified a finding by the jury that reasonable persons would have under- G stood the words complained of to refer to the plaintiff. The ground of this submission is that the words were not capable of such a meaning. (ii) Even assuming that the words were capable of a meaning defamatory of the plaintiff, the fact that they were true of another person affords a good defence to the appellants.

H As to the first submission, there is a clear distinction between the question which a jury may have to answer and the preliminary question which is for the court. The question for the court is, to adopt the language of LORD HALSBURY, L.C., in *Nevill* v. *Fine Art & General Insurance Co.* (4), at pp. 76, 77, whether the words are

> . . . susceptible of a libellous meaning in this sense, that a reasonable man could

> construe them unfavourably in such a sense as to make some imputation upon the person complaining.

If the judge holds the words to be susceptible of a defamatory meaning in that sense, the jury are the constitutional tribunal to decide whether the words in fact have that meaning. That is to say, it is for the jury to decide whether the reasonable man whom they may be supposed collectively to typify *would* (not could) so construe them. The question which the judge must put to himself involves the assumption that the hypothetical reasonable man is capable of forming what the jury (and perhaps the judge also) may think to be an unduly censorious or suspicious view. The judge must be careful not to answer in advance the question which is properly for the jury, and to observe the limitation imposed upon his proper function by the law. At the same time, he must not shrink from withdrawing the case from the jury if he is satisfied that no reasonable man *could* (not would) attach to them the defamatory meaning alleged.

I express no opinion as to the answer which the jury ought to have made to the first question left to them by HAWKE, J. I am clearly of opinion, however, that the judge was right to leave the question to the jury. There was evidence, in my opinion, which would justify a jury in finding, in the language of the statement of claim, that the description "Harold Newstead, 30-year-old Camberwell man" substantially fits the plaintiff. The plaintiff is known as a hairdressers' assistant to a comparatively wide circle of customers and other acquaintances in Camberwell, where he has acquired a modest fame. A reasonable man who had some acquaintance with him might have been prudent enough, on reading the alleged libel, to say "This may refer to some other Harold Newstead," but I am not satisfied that every reasonable man would necessarily have been so cautious. The man who believes no ill of his neighbour until the accusation is proved beyond doubt against him is without question a reasonable man, but it would be fallacious to argue that every reasonable man attains to that high standard of judicial fairness. Evidence proving the existence of another person to whom the words might have been taken to refer is only relevant to this first question because it proves the words to have been capable of more than one meaning, and of at least one meaning which would not be defamatory of the plaintiff. It cannot now be argued (in this court, at any rate) that, in the words of SCRUTTON, L.J., in *Cassidy* v. *Daily Mirror Newspapers* (5), at p. 339:

> . . . if words are capable of several meanings, some defamatory and some innocent, they should not be left to the jury.

The correct view is that, if the words are reasonably capable of two or more meanings, of which one is defamatory, it must be left to the jury to determine in which sense a reasonable man would understand them.

If I am right in rejecting the appellants' first submission, it is necessary to come to a decision on the interesting and difficult question raised by the second. In my opinion, it is now settled law that, in the words of RUSSELL, L.J., in *Cassidy* v. *Daily Mirror Newspapers* (5), at p. 354:

> Liability for libel does not depend on the intention of the defamer; but on the fact of defamation.

A I quote these words of RUSSELL, L.J., as conveniently summarising the effect of his own judgment, and of that of SCRUTTON, L.J., in *Cassidy's* case (5), and as clearly stating the principle established by *Hulton (E.) & Co.* v. *Jones* (1). It seems to me to be impossible, consistently with this principle, to make the defendant's liability depend on the accuracy of B his words in relation to some person other than the plaintiff at whom he says he meant to strike. Nor do I think, with the greatest respect for the view expressed by FARWELL, L.J., in *Hulton (E.) & Co.* v. *Jones* (1), that any doctrine which would make the defendant's liability depend upon his state of mind, or the degree of care which he exercised, C is reconcilable with this principle. In the present case, and in any similar case in which a defendant says that he was only speaking the truth of another person, and not meaning to attack the plaintiff, it may well be right to direct the jury that a reasonable man must be aware of the possibility (it is for them to say in each case whether it amounts D to a possibility) that in any district there may be more than one person of the same name, and that, in considering how a reasonable man would understand the words, they must assume that he will read them with such care as may fairly be expected of him, not ignoring any parts of the description which are inapplicable to the plaintiff. If a defendant E has been careful and precise, he may by his care avoid the risk of a successful action, but he cannot, in my opinion, escape liability merely by showing that he was careful and that his intentions were good. SIR WILFRID GREENE, M.R., has dealt fully with this part of the case, and I would add that I find myself in complete agreement with all his F observations upon it.

If these two submissions on the part of the appellants are rejected, it follows, in my opinion, that the judge was right in holding that the case had yet to be tried. Counsel for the appellants suggested, however, that it would be proper to make an order limiting the trial to the issue G of liability, and to treat the quantum of damages as having been already the subject of a decision. It is plain, I think, that we would have no power to take that course, even if it commended itself to us. This is not a case in which a new trial is being sought, or in which a verdict has been given on one issue. The answers of the jury do not amount to H a verdict, so that there has been no verdict and no trial. When a jury has failed to agree on the question of liability, its opinion as to what the damages should have been can have no legal effect.

If this court were to say that such an assessment of damages must stand, it would in effect be adopting the jury's assessment of damages as its own, or, in other words, itself deciding what damages ought to be awarded, a decision which it has no power to make: *Watt* v. *Watt* (6). It is hardly necessary to add that this case is clearly distinguishable from one in which the issues joined on different causes of action have been left to a jury, who have returned a verdict on one or more of them and been unable to agree as to the others: *Marsh* v. *Isaacs* (7). It is equally plain that R.S.C., Ord. 39, r. 7, has no application to a case where the court is not granting a new trial, but, on the contrary, is holding that there has not yet been a trial. In the circumstances, I prefer to express no view as to the adequacy of the amount assessed by the jury. I agree with SIR WILFRID GREENE, M.R., in thinking that the appeal should be dismissed, and it becomes unnecessary to decide the questions raised by the cross-appeal.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Shirley Woolmer & Co.* (for the appellants); *Manches & Co.* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re MORRISON'S WILL TRUSTS, WALSINGHAM *v.* BLATHWAYT.

[CHANCERY DIVISION (Bennett, J.), **November 8, 9, 1939.**]

Wills—Legacy—Forfeiture clause—Life interest forfeited—Interests of issue—Severability of forfeiture clause—Rule against perpetuities.

By her will, the testatrix left a legacy of £5,000 to the first defendant during her life, with a proviso that the same should be held in trust for all or any of her children who should attain the age of 21 years. There followed a clause the material part of which was as follows: "If either during my lifetime or after my death any legatee shall become a Roman Catholic then as from the occurrence of such event such legatee shall forfeit all benefits." The first defendant, who became a Roman Catholic, had a daughter, the second defendant, who also became a Roman Catholic, and two sons, the third and fourth defendants, who did not become Roman Catholics. The question asked was whether any, and, if so, which, of the defendants, had forfeited his or her interest. One contention was that the forfeiture clause was void in its entirety, as it might operate outside the time-limit allowed by the rule against perpetuities. The other contention was that the forfeiture clause could be separated, and could operate in respect of some, but not in respect of all, of the defendants, as some of them might do the prohibited act at a point of time outside the time-limit allowed by the rule against perpetuities. Any forfeited legacies were to fall into and form part of the residuary estate. The estate was insufficient to pay the legacies in full:—

HELD: (i) the interests of all the defendants were forfeited on the date the first defendant was received into the Roman Catholic Church.

(ii) it not being clear that the will intended the residuary legatees to take the forfeited shares as legatees, those shares ought not to be paid wholly to the residuary legatees, but must also be used in making further payments to the legatees not yet paid in full.

[EDITORIAL NOTE. Where there is a time fixed at which a fund is to be divided into separate shares, and that time is not obnoxious to the rule against perpetuities, then each share stands separate from the others, and the limitation of each share takes effect or not according as the dispositions of that share do or do not violate the rule, and the valid gift of one share is not made void by the invalidity of the gift of another share.

AS TO SEVERABILITY OF SHARES IN RESPECT OF THE RULE AGAINST PERPETUITIES, see HALSBURY, Hailsham Edn., Vol. 25, pp. 140, 141, paras. 233-237; and FOR CASES, see DIGEST, Vol. 37, pp. 101, 102, Nos. 359-373.]

Cases referred to:

(1) *Re Russell, Dorrell* v. *Dorrell*, [1895] 2 Ch. 698; 37 Digest 102, *370*; 64 L.J.Ch. 891; 73 L.T. 195.

(2) *Hodgson* v. *Halford* (1879), 11 Ch.D. 959; 37 Digest 102, *372*; 48 L.J.Ch. 548.

ADJOURNED SUMMONS to determine if any, and, if so, which, interests under the will of the testatrix had been forfeited. The facts and arguments are fully set out in the judgment.

Wilfrid M. Hunt for the plaintiffs, the trustees.

E. G. Eardley-Wilmot for the first and second defendants.

Horace Freeman for the third and fourth defendants.

J. A. Reid and *C. L. Fawell* for other interested parties.

BENNETT, J.: Under the will, dated June 3, 1904, of Mrs. Morrison, who died on Dec. 17, 1909, there was given to the testatrix's great-niece, Elizabeth Helen de Grey, a legacy of £5,000. Elizabeth Helen de Grey married, and is now the first defendant, the Hon. Elizabeth Helen Blathwayt. By cl. 15 of her will the testatrix settled legacies to female legatees in the following terms:

> I direct that my trustees shall retain the legacy (unless it be a specific legacy or a life interest only) to which any female legatee shall or if she shall not survive me would but for her not having survived me have become entitled under the provisions hereinbefore contained (but I do not include in this category the legacies to Alexandra Georgina Heathcot Amory and the Duchess of Somerset which I have given them wherewith if they survive me to buy some remembrance of me or the legacy to Lady Lawrence or the legacies to my godson Sidney Russell Cooke and my goddaughter Rose Mary Banbury) and shall invest such legacy and hold the same and the investments for the time being representing the same and the income thereon upon trust to pay such income to such legatee during her life and during any coverture without power of anticipation and after her death as to both capital and income in trust for all or any one or more exclusively of the others or other of her issue at such time and if more than one in such shares with such provisions for maintenance education and otherwise at the discretion of any person or persons and with such gifts over and generally in such manner for the benefit of such issue or some or one of them as she shall whether covert or sole by deed revocable or irrevocable or by will or codicil appoint and in default of and until and subject to any such appointment and also if she shall not survive me in trust for all or any her children or child who being sons or a son have or has attained or shall attain the age of 21 years or being daughters or a daughter have or has attained or shall attain that age or have or has married or shall marry and if more than one in equal shares.

Then there is a hotchpot clause. Clause 17 provides as follows:

> If either during my lifetime or after my death any legatee under my will including any person who shall benefit under this present clause shall be or become a Roman Catholic or shall marry a Roman Catholic or shall give any promise or shall come under any obligation to bring up as a Roman Catholic any child of such legatee then and in every such case and as from the occurrence of such event such legatee shall absolutely forfeit and lose all benefits and powers given to him or her by my will including this present clause and so that if any such benefit be an annuity

> the annuity shall forthwith cease as if the legatee were dead and if any such benefit be a life interest the fund out of which such life interest is payable shall fall into and shall forthwith form part of my residuary estate and be held upon the trusts herein declared concerning the same and if any such benefit be an absolute interest the same shall also fall into my residuary estate and if the legatee be my residuary legatee my residuary estate shall be held in trust for such of his three brothers as shall survive me and shall not be or be married to a Roman Catholic and shall not have given any promise or have come under any obligation to bring up as a Roman Catholic any child of his and if there be more than one such brother of my residuary legatee the same shall be held in trust for them in equal shares provided always and I hereby direct that my trustees shall be protected in paying any principal sum to any person interested under my will if they shall have before making such payment obtained from the person to whom such payment is to be made a declaration that he or she as the case may be is not a Roman Catholic or the wife or husband of a Roman Catholic.

Mrs. Blathwayt has three children, the defendants Christopher George Wynter Blathwayt, Justin Robert Wynter Blathwayt, and Elizabeth Henrietta Blathwayt. It has been admitted that Mrs. Blathwayt has become a Roman Catholic, and that she was received into the Roman Catholic Church on May 18, 1934. The defendant Elizabeth Henrietta Blathwayt has also become a Roman Catholic. Neither of the two sons, the defendants Christopher Blathwayt and Justin Blathwayt, is a Roman Catholic.

The first question asked is as follows:

> As to the said settled legacy of £5,000 whether on the true construction of the said will and in the events which have happened (*a*) the life interest of the first defendant in such legacy has been forfeited, and, if so, as from what date, (*b*) the interests of all or some and which of them the second, third and fourth defendants in the said legacy have been forfeited, and, if so, as from what date, (*c*) the whole or some and what share in or part of the capital of the funds representing the said legacy and the income thereof have fallen into and form part of the residuary estate of the said testatrix.

On behalf of Mrs. Blathwayt and her daughter and her two sons, it has been argued, first of all, that the condition in cl. 17 of the will is void because it may operate at a point of time outside the period of time allowed by the rule against perpetuities. That is to say, it may operate outside a period of time measured by a life or lives in being and the period of 21 years. On behalf of the two sons of Mrs. Blathwayt, in addition to that argument being advanced, it has been argued that, so far as they are concerned, they are not affected by the fact that their mother has been received into the Roman Catholic Church, and that cl. 17 operates only to forfeit her life interest in the fund. As regards that last argument, I think that there is nothing in it, with all respect to counsel for the third and fourth defendants, who advanced it. If the clause operates at all, in my judgment it operates to defeat the interests of all persons to whom the testatrix has given an interest in the settled legacy. The substantial question is whether or not the clause is void because it may come into operation outside the perpetuity period. For the purpose of deciding the question, I will assume that it applies to the three defendants—the daughter of Mrs. Blathwayt and the two sons—on the ground that they are legatees under the testatrix's will within the meaning of cl. 17. I assume that. I do not decide it, because, having regard to the view I have taken as to the operation of the clause, I do not think that it is necessary that it should be decided. The way it is put is this. It applies, so the argument goes, not merely to the legatee who, ascertained within the limits of perpetuity and within those limits, does the prohibited thing, but also to persons who may be ascertained A within the limits but may do the thing outside the limit of the rule, and, therefore, as a whole the clause is bad, because it may defeat at a point of time outside the period fixed by the rule against perpetuities an interest then vested. The question is whether the clause must be construed and applied in that way, or whether it can be separated and applied to the B interests of each person who becomes a legatee under the will, and, if the person to whom it is sought to apply it is a person who must do the act which brings about the result within the perpetuity period, then the question is whether, as regards that person, the condition is good, although, if applied to another legatee under the will, it may be bad, C because that person may do the act which operates to defeat his or her interest outside the perpetuity period.

I think that the principle is settled in favour of those who have argued for the validity of the provision as applied to Mrs. Blathwayt by the decision of the Court of Appeal in *Re Russell, Dorrell* v. *Dorrell* (1). The D headnote of that case is as follows:

> A testator gave his residuary estate in trust, after the death of M. and her husband, for all the daughters of M. who should attain 21 or marry under that age; with a proviso that the share of any daughter should be held upon trust for her for life, and after her death upon similar trusts for her children as were thereinbefore declared for the children of M. M. had one daughter only, the plaintiff, who attained 21, E and she was born in the lifetime of the testator.

It was held by the Court of Appeal, affirming the decision of CHITTY, J., that:

> . . . the proviso for resettlement of the shares must be construed as applicable to each share separately; and that although it would have been void for remoteness F in the case of daughters born after the death of the testator, it was valid in the case of the plaintiff, and therefore she was only entitled to a life interest in the fund.

In the same case, RIGBY, L.J., delivering the judgment of the Court of Appeal, said, at p. 702:

> It is suggested that the proviso for the settlement of the shares which I have read is void for remoteness, inasmuch as there might have been a daughter of Mary Dorrell G born after the testator's death who would live to take a vested interest, and whose children would not necessarily attain 21 within the period allowed by law for the postponement of the vesting of a benefit. No doubt, in the case of such a daughter, the settlement over directed by the proviso would have been void; but it would be perfectly good as to the interest taken by the plaintiff, who was alive at the testator's death, unless the possible operation of the proviso with reference to the share of a daughter not in existence at the testator's death make the whole H proviso void. Looking at the state of things at his death, it was then clear that the plaintiff must take either the whole or a share, and other daughters of Mary Dorrell might come in and take shares. Assuming them to do so, yet the share of the plaintiff and the shares of such other daughters would be perfectly separate and distinct, and completely ascertained and separated within the limits of vesting allowed by the law. The proviso in no way mixes them up, but operates separately upon each share. The settlement of the plaintiff's share directed by it is perfectly legal, and would have been so even though there were other shares to which the proviso could not legally apply. If, indeed, there had been a proviso which could

> only operate upon all the possible shares, if it operated at all, the case would have been different; but the settlement of the plaintiff's share is to take place, whether there are other shares or not, and it takes place as from the testator's death in favour of the children of a person then living, and is quite unobjectionable. This is not the case of a gift over, which depends upon events so stated as to involve a possibility of its taking effect outside the permitted limits, or in favour of persons who might take interests vesting beyond those limits. No splitting of the clause is necessary, since it is so framed as to apply separately to the plaintiff's share.

I think that, upon the true construction of cl. 17 of the testatrix's will, upon the hypothesis that the word "legatee" includes every person who takes a benefit in a legacy under the will, the clause is capable of being applied separately to the interests of that legatee, and, upon that footing, if he is one of the persons who has done the prohibited act, and can only have done it within the perpetuity period, then, as regards that person, it seems to me the condition is valid upon the same principles as those applied by Rigby, L.J. Indeed, it seems to me that that must have been the footing upon which Hall, V.-C., decided *Hodgson* v. *Halford* (2) as he did. The result, I think, is that, upon the facts proved, the interest of the first defendant has been forfeited from the date when she was received into the Roman Catholic Church. Under the terms of cl. 17, it follows, in my judgment, that the interest of all the three children in the legacy has been forfeited and from the same date.

The terms of the clause provide that, if the benefit forfeited be a life interest, the fund out of which such life interest is payable shall fall into, and shall forthwith form part of, the testatrix's residuary estate. The further question is whether the persons named in the will as residuary legatees are to take the forfeited legacy or whether it is to be utilised for making further payments to the pecuniary legatees who have not yet received payment in full of the legacies which the testatrix directed to be given. In my judgment, it is a matter of principle. Unless it is made clear in a case such as this that the residuary legatee is to take as a legatee, and not as a residuary legatee, the forfeited legacy must be used in making further payments to those legatees who have not yet received that which the testatrix said that they were to receive, because it is not until they are satisfied that the residuary legatee is entitled to anything. I propose to answer the second question in favour of alternative (*b*).

Interests of first and second defendants forfeited, and to fall into residuary estate. Costs of all parties as between solicitor and client payable out of legacy.

Solicitors: *Johnson, Jecks & Colclough* (for the plaintiffs); *Thorold, Brodie & Bonham-Carter*, and *Woolley & Whitfield* (for the defendants and other parties).

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

Re A DEBTOR, *Ex parte* DUNN TRUST, LTD.

[CHANCERY DIVISION (Morton and Farwell, JJ.), **November 9, 1939.]**

Emergency Legislation—Leave to enforce judgment or order—Leave given in High Court—Application to file bankruptcy petition in county court—"Appropriate court"—Courts (Emergency Powers) Act, 1939 (c. 67), *s.* 1 (1), (2) (*a*)*—Courts (Emergency Powers) Rules,* 1939, (*S.R. & O.,* 1939, *No.* 995), *rr.* 2, 4.

On Sept. 30, 1939, the applicants applied in the High Court for, and were granted, leave to enforce a judgment for £100. They then applied in the Oxford County Court to file a bankruptcy petition founded on the failure of the debtor to comply with a bankruptcy notice founded on that judgment. The registrar refused to file the petition, on the ground that, under the Courts (Emergency Powers) Rules, 1939, r. 4, the applicants required the leave of the county court before the petition could be filed:—

HELD: the leave given in the High Court enabled the applicants to enforce their judgment by bankruptcy proceedings in the county court, and the registrar should have filed the petition.

[**EDITORIAL NOTE.** The question at issue here turns upon which is the appropriate court to give leave to enforce a judgment or order. It was contended that the Courts (Emergency Powers) Rules, 1939, r. 4 (2), makes it necessary, where it is intended to enforce the judgment by bankruptcy proceedings in a county court, to obtain the leave of the county court. On the other hand, it was said that, under r. 2, the High Court was the appropriate court to give leave, since it was the court by which the judgment had been given. The decision is in favour of the latter contention. The main difficulty would appear to lie in the construction of r. 4 (2). It is said by MORTON, J., that this rule is applicable where the applicant requires to exercise one of the remedies referred to in sect. 1 (2) (*a*) of the Act, which are remedies by distress, equitable execution and forfeiture. The rule, however, is not in its terms confined to such remedies.

AS TO EMERGENCY POWERS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, para. 13; and FOR CASES, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

APPEAL from the refusal of the Registrar of the Oxford County Court to file a petition in bankruptcy. The applicants, Dunn Trust, Ltd., commenced an action in the High Court by specially indorsed writ against the debtor in respect of £100 and interest due on a promissory note, and, upon taking proceedings under R.S.C., Ord. 14, obtained judgment for the principal sum of £100, but the action was ordered to proceed in respect of the interest. On Aug. 19, 1939, the applicants served on the debtor a bankruptcy notice founded on this judgment. On Sept. 30, 1939, they applied in the High Court for leave to proceed to enforce that judgment, such application being made under the provisions of the Courts (Emergency Powers) Act, 1939. The High Court granted leave to proceed, and on Nov. 3, 1939, the petitioning creditors, in pursuance of that leave, applied *ex parte* to the registrar of the Oxford County Court to file a bankruptcy petition against the debtor. The registrar refused to file the petition, on the ground that the leave to proceed obtained in the High Court allowed proceedings to be brought only in the High Court, and, if a petition were required to be filed in the county court, leave to proceed must be obtained in the county court.

The Courts (Emergency Powers) Act, 1939, s. 1, provides as follows :

> (1) Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether given or made before or after the commencement of this Act) for the payment or recovery of a sum of money. . . .
>
> (2) Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court :
>
> (*a*) to proceed to exercise any remedy which is available to him by way of :
>
> (i) the levying of distress ;
>
> (ii) the taking of possession of any property or the appointment of a receiver of any property ;
>
> (iii) re-entry upon any land ;
>
> (iv) the realisation of any security or the forfeiture of any deposit ; or
>
> (v) the serving of a demand under the Companies Act, 1929, s. 169 (1) . . .

Sect. 2 (1) provides as follows :

> The appropriate court for the purposes of any of the provisions of this Act shall be such court as may be designated by rules made by the Lord Chancellor under this Act, and such rules may designate different courts in relation to different classes of proceedings.

The Courts (Emergency Powers) Rules, 1939, provide as follows :

> 1. The appropriate court for the giving of the leave required by sect. 1 shall be the court prescribed in rr. 2, 3, 4 and 5.
>
> 2. Under subsect. (1), for proceeding to execution of a judgment or order for the payment or recovery of a sum of money or for enforcing any such judgment or order otherwise than under the Debtors Act, 1869, the appropriate court shall be the court by which the judgment or order has been given or made, or in which the judgment or order is being sought, and for enforcing any such judgment or order, under the Debtors Act, 1869, the appropriate court shall be the court in which the enforcement is being sought.
>
> 4. (2) Where leave is required for the purpose of taking proceedings in a county court, the application for leave shall be made in the court where the proceedings are to be taken, and in any other case where the county court is the appropriate court, the application for leave shall be made in the county court for the district in which the respondent or one of the respondents resides or carries on business or the subject-matter of the application is situate.
>
> 4. (3) Where the High Court and the county court have concurrent jurisdiction under this rule, the application shall not be made to the High Court except under special circumstances.
>
> 4. (4) Where an application is made to the High Court and the court or judge is of opinion that it ought to have been made in the county court, the court or judge may order the matter to be transferred to the county court.
>
> 9. (1) Where no judgment or order has been given or made, an application under subsect. (1) or subsect. (3) for leave to proceed may be made at the time when the judgment or order is given or made in the presence of the defendant or respondent or his solicitor or counsel or on notice given in accordance with the provisions of the next succeeding paragraph. (2) The notice shall be to the effect of Form No. 3 and shall be served on the defendant or respondent not less than two clear days before the judgment or order is given or made, unless the court or judge otherwise orders.
>
> 10. Where a judgment or order has been given or made, an application under subsect. (1) or subsect (3) for leave to proceed may be made by summons in the proceedings.

Cyril B. Salmon for the applicants.

MORTON, J. [His Lordship stated the facts and read the material parts of the Act and rules set out above] : The section of the Act relevant to this case is sect. 1 (1). The applicant is proceeding to enforce a judgment or order within the meaning of that subsection, and the rules provide which is the appropriate court to which the applicant must apply for leave to proceed to such enforcement. It is clear from the Courts (Emergency Powers) Rules, 1939, r. 2, that the appropriate court is that by which the judgment or order has been made. Rule 2 is the rule governing the present application. Rule 4, which was relied upon by the registrar, is applicable to persons proceeding under sect. 1 (2) (*a*) of the Act, but it is not applicable to the present case. It is clear that the Act has been wrongly construed, and this view is supported by rr. 9 and 10. The appeal must be allowed, and the matter must be sent back with a direction to file the petition.

FARWELL, J.: I agree. The intention of the enactment is to prevent anyone from enforcing a judgment or order without the leave of the court, but, once leave to proceed has been granted, the party so granted leave may take all proper steps to enforce the judgment or order, and is in the same position as that in which he would have been before the Act was passed.

Solicitors: *Woolfe & Woolfe* (for the applicants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

HAILE AND OTHERS *v.* WEST.

[COURT OF APPEAL (Slesser and Luxmoore, L.JJ., and Atkinson, J.), **October 30, 31, November 15, 1939.]**

County Courts—Costs—Remitted action—Payment into court—Three plaintiffs —Three separate sums paid into court—Taxation in respect of each sum paid in—Scale applicable—County Courts Act, 1934 (c. 53), *s.* 73.

In a remitted action, in which there were two adult plaintiffs and one infant one, the defendants paid in £25 in respect of one adult plaintiff, £35 in respect of the other, and £5 in respect of the infant. Upon an application, the judge granted leave to take these sums out of court and ordered the plaintiff's costs to be taxed on the High Court scale up to the time of remission to the county court and thereafter on Scale C down to the time of payment into court:—

HELD: the judge was not entitled to aggregate these costs into one sum which would carry costs on the higher scale, but the costs of the adult plaintiffs must be taxed on Scale B and the infant's costs on the Lower Scale, Col. 1, and the scale upon which these costs were to be taxed was not in the discretion of the county court judge.

[EDITORIAL NOTE. The facilities given by the rules of court for the joinder of plaintiffs do not make three separate causes of action vested in three different plaintiffs one cause of action, and for that reason it is impossible in a case like the present to tax the costs of the three plaintiffs as for one aggregate sum, but the costs of each plaintiff must be dealt with separately.

AS TO COSTS IN REMITTED ACTIONS, see HALSBURY, Hailsham Edn., Vol. 8, p. 357, para. 758; and FOR CASES, see DIGEST, Vol. 13, pp. 490-492, Nos. 404-420.]

Cases referred to:

(1) *Campbell (Donald) & Co.* v. *Pollak*, [1927] A.C. 732; Digest, Practice, 788, *3503*; 96 L.J.K.B. 1132; 137 L.T. 656.

(2) *Davies* v. *Davies*, [1928] 1 K.B. 364; Digest Supp.; 96 L.J.K.B. 1066; 137 L.T. 567.
(3) *Gallivan* v. *Warman*, [1930] W.N. 96; Digest Supp.

Interlocutory Appeal by the defendant from an order of His Honour Judge Konstam, K.C., made in the Lambeth County Court on June 27, 1939. In a running-down action, there were three co-plaintiffs, one of whom was an infant. The action was started in the High Court and remitted to the county court. The defendants paid in £25 in respect of one adult plaintiff, £35 in respect of the other, and £5 in respect of the infant. The plaintiffs applied to the judge for leave to take these sums out of court, and, in giving leave, the judge made an order that the defendant should pay the costs of the plaintiffs to be taxed on the High Court scale up to the time of remission to the county court, and thereafter on Scale C of the county court scales down to the time of payment into court. The defendant appealed, asking that the order be varied so that the defendant be ordered to pay the costs of the adult plaintiffs to be taxed on Scale B up to the date of remission, and also from the date of remission to the date of payment in, and the costs of the infant plaintiff to be taxed on Lower Scale, Col. 1, of the county court scales from the date of remission up to the date of payment in, but no costs of the infant plaintiff up to the date of remission. He maintained that, upon the true construction of the County Courts Act, 1934, ss. 47, 73, and of C.C.R., Ord. 47, rr. 1, 5, 6, 8, he had no jurisdiction or discretion to order as he did. In making the order, the judge proceeded on the footing that the sum paid in exceeded £50. The defendant maintained that the judge was not entitled to add the three sums together, but must deal with each of them separately.

J. F. F. Platts Mills for the appellant.
S. Parnell Kerr for the respondents.

Slesser, L.J.: This is an action brought by three co-plaintiffs, Robert Haile, Frances Haile his wife, and Alan Haile, an infant suing by his next friend, Robert Haile, against one A. H. West for damages suffered by all these plaintiffs through the negligence of the defendant. The defendant was driving a motor car, and it is alleged that he drove it so unskilfully that it collided with the first plaintiff's motor cycle combination, while the first plaintiff was carrying with him on his motor cycle combination his wife and the infant.

The action was started in the High Court, but was remitted to the county court on the usual allegation of need for security, which was not given. On June 1, 1939, there were paid in certain sums in satisfaction of the claim. The sums were £25 as regards the father, £35 as regards the mother, and £5 as regards the child. It was necessary that the matter should come before the county court judge for two reasons. First, under C.C.R., Ord. 11, the time having elapsed for taking out the money, it was necessary for the leave of the county court judge to be obtained. Secondly, one of the persons in respect of whom the money had been paid in was an infant.

The question now before the court concerns the order for costs made by the county court judge in giving leave for this money to be paid out. The county court judge made an order, which is now complained of in one particular. The order was that the costs should be on the High Court scale down to the date of remission, and thereafter should be on Scale C. There is in this appeal no complaint of so much of that order as refers to the High Court scale of costs down to the date of remission, but it is complained that, in the circumstances, the judge had no power to award costs on Scale C in respect of those sums of £25, £35 and £5.

I may say at the outset that this is not a case where the judge has purported to give costs on Scale C by reason of granting any certificate. Under the provisions of C.C.R., Ord. 47, r. 13, there is power, in any proceeding in which the judge certifies on the termination of the proceedings that a question of law of importance was involved, for the judge to award costs on such scale as he thinks fit. In the present case, he has not purported to do that, nor is there any suggestion that his award of costs on Scale C can be supported on the basis of that rule. What the judge has done is this. He has had recourse to C.C.R., Ord. 47, r. 5 (2), and he has come to the conclusion that he was entitled to award costs on the basis that the sum paid in exceeded £50, in which case the scale applicable, in the absence of some special order, is to be Scale C. It is true that, if the amounts paid into court in respect of the father, the mother and the child be aggregated, the total sum is more than £50. It is equally true that, if it be not so aggregated, according to the scale of costs to which I have referred under Ord. 47, neither the father's nor the mother's nor the child's costs can be on the scale applicable if they exceed £50. The mother and the father are in the category exceeding £20 and not exceeding £50. The infant is in the category exceeding £2 and not exceeding £5, Lower Scale, Col. 1. Therefore, this appeal resolves itself into one question, and into one question only—namely, was the county court judge entitled to aggregate these costs, so as to create a sum which would carry costs on the higher scale ?

To my mind, this is not a case which can be dismissed merely by saying that it was a matter within the judge's discretion. If he has exercised his discretion contrary to the rules, which have statutory sanction, then, according to *Campbell* v. *Pollak* (1) and other well-known authorities, this court has ample power to deal with the matter.

In my opinion, the judge has erred in law in aggregating these sums. These plaintiffs are in reality three separate complainants. They may, under R.S.C., Ord. 16, r. 1—and the rules of the High Court are the first to be looked at here, since it was in the High Court that this action was started—be joined in one action as plaintiffs in whom any right to relief is alleged to exist in respect to the same transaction or series of transactions, whether jointly, severally, or in the alternative, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief. When the history of those procedure rules comes to be considered, it is quite clear that it is only by a process of procedure or machinery that these people are so to be joined together. As a matter of legal principle, each of them has a separate right. If several persons are each claiming for an accident, the eventual liability may vary, because in each case there is to be considered the question of the negligence of the defendant towards a particular plaintiff, together with the damage sustained by each injured person.

Counsel for the respondent is driven to admit that, if these three persons had elected to proceed separately in separate actions, and he had taken no steps to consolidate the actions, the judgment obtained against him in the three separate actions would have been unimpeachable. It is, indeed, more a matter of convenience for the purpose of pleading that the rules have now been so devised, and for the purpose of economy to encourage joinder and consolidation. The principle, however, remains unimpaired. Each of those persons, in my opinion, has, in the true sense of the word, a separate cause of action. If that be the case, the result which seems to follow is this. There is nothing in the rules, either of the High Court or of the county court, which permits the consideration of the fortuitous fact that, certain persons having separate causes of action, there is provision in the rules enabling them to join those causes of action together.

Counsel for the respondent says, in the first place, that what is to be regarded here is only the provision dealing with remitted actions, and that, under the County Courts Act, 1934, s. 73, which is sect. 12 of the old Act of 1919, where an action is ordered to be transferred from the High Court to the county court, the costs shall be in the discretion of the court to which the proceedings are transferred. On that assumption, he must equally argue, I think, that that discretion, which he argues to be a completely unfettered one, unfettered by any rules of the county court in cases where proceedings were started in the county court, must also apply where there has been a transfer from one county court to another county court. That argument has already been before the Divisional Court in *Davies* v. *Davies* (2). Counsel for the respondent is perfectly entitled to say that this court sitting here to-day is not bound by that decision, though it is in fact a decision of two Lords Justices, Atkin and Lawrence, L.JJ., sitting as a Divisional Court. That was a case where a claim by the plaintiff had been remitted to the county court, and a contention, identical in principle with that which was raised here, was discussed, and the very argument which counsel for the respondent has presented to us here was presented—namely, that sect. 12 of the old Act of 1919, now the County Courts Act, 1934, s. 73, gave the judge an unfettered discretion in the case of a remitted action which possibly he would not have had under the provisions of C.C.R., Ord. 47,

r. 5, dealing with scales of costs applicable in case of actions started in the county court.

As ATKINSON, J., pointed out in the course of the argument, if that were the case where a case was transferred from one county court to another, a discretion would arise which would not arise if the case were
A started in the particular county court in which it was heard. That is a peculiar result, but one from which one would not flinch if it were the true view of the law. However, as ATKIN, L.J., points out with great clarity, that argument is not acceptable, because it was not intended to give to the county court judge larger or further powers than he would
B otherwise have had.

> The object of the section [now sect. 73 of the Act of 1934] was to determine who was to exercise the discretion. . . . Take the case of a plaint filed in the wrong court. It would be anomalous that in such a case the Act should give a wider or larger discretion to the judge to whose court the action was transferred. It was not intended that the transferee should have a wider discretion as to costs.

C Thus, ATKIN, L.J., concludes that sect. 12 of the Act of 1919 has to be read in conjunction with the County Courts Act, 1888, s. 119, and that it follows that the discretion is limited as in that Act, which now finds expression in C.C.R., Ord. 47, r. 13. LAWRENCE, L.J., gives judgment to the same effect.

D In my view, *Davies* v. *Davies* (2) was perfectly correctly decided. If it were necessary to say so, I should have come to exactly the same conclusion myself, had that case been before this court for consideration. That being so, the discretion in this remitted action is no more and no less than it would have been if the action had been started in the High Court. One
E comes, therefore, to the question of whether or not it is right, having regard to the question of principle which I have mentioned as to the real nature of these causes of action, to aggregate them. It has already been decided in this court, again by two Lords Justices sitting as a Divisional Court, in *Gallivan* v. *Warman* (3) that such an aggregation,
F as I read the decision, is in principle improper. We are told that, both in the High Court and in the county court, the principle laid down by that decision has been adopted ever since, and that the kind of aggregation which has here been sought to be made by the county court judge is contrary to practice.

G In *Gallivan* v. *Warman* (3) the facts are stated thus :

> The plaintiffs, who were husband and wife, brought an action in the High Court against the defendant for damages for negligence in driving a motor car, whereby the wife was injured. The action was transferred to the county court, and the defendant paid into court £45 to meet the wife's claim and £5 to meet the husband's claim, which sums the plaintiffs accepted. The county court judge refused to make an order for High Court costs on the ground that the plaintiffs
> H had recovered less than £50.

Thus the actual decision of the county court judge there was rather on the question of High Court costs than on the question of costs on Scale C in the county court, but the principle is the same. SCRUTTON, L.J., said, at p. 96 :

> In the present case £45 and £5 had been paid in to meet the respective claims of

the plaintiffs, and each had recovered "less than £50," so as to fall within the scope of sect. 11. It was argued by Mr. White that the two sums were to be added together. But there was no authority for that proposition, and the section appeared to refer to one judgment, namely, judgment for the amount recovered by one plaintiff.

I concurred in that judgment. The court decided that it was wrong in such a case to aggregate, and the reason must have been the reason which moves me to come to the same conclusion in the present case—namely, that, when the matter is considered in principle, there are three separate causes of action here. That seems to me to determine the matter.

The only question outstanding seems to be what scale ought, on the principles which I have suggested, to be applied. I have already indicated that, in my view, in respect of the £25 and the £35, the proper scale which should have been applied under C.C.R., Ord. 47, r. 5, is costs on Scale B. With regard to the infant, the proper order ought to have been the Lower Scale, Col. 1. This appeal, therefore, succeeds.

Luxmoore, L.J.: I agree.

Atkinson, J.: I agree. The county court judge has decided that the plaintiffs were entitled to an award of costs on Scale C. He took the view that, this action being a transferred action, he had complete discretion under sect. 73. If the action had been started in the county court, it is quite clear that he would have had no unfettered discretion. He could give costs on Scale C only if he certified under C.C.R., Ord. 47, r. 13. Of course, it would have been impossible to give a certificate under that rule in a case of this sort, and no certificate was in fact given. The county court judge took the view, however, that, under sect. 73, he had an unfettered discretion. *Davies* v. *Davies* (2) was not called to his attention, but that case makes it perfectly clear that his discretion in a transferred action is precisely the same as the discretion which he would have had if the action had been started in the county court. I know it is open to us, if we think it wrong, to overrule *Davies* v. *Davies* (2), but, speaking for myself, I think that it is absolutely right, and the argument of Atkin, L.J., is quite unanswerable. I agree on the point indicated by Slesser, L.J., that the appeal succeeds.

Appeal allowed with costs.

Solicitors: *L. Bingham & Co.* (for the appellant); *Schultess-Young & Co.* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

ENGLISH *v.* WESTERN.

[KING'S BENCH DIVISION (Branson, J.), **November 14, 1939.**]

Insurance—Policy—Conditions—Policy against third-party risks—Exception —" Member of the assured's household."

A lad of 17 took out a policy of insurance against third-party risks in respect of a motorcar. The policy contained an exception of the " death or injury to any member of the assured's household " carried in or upon the car. A claim was made under the policy in respect of an accident to the sister of the insured :—

HELD : upon the true construction of the policy, the sister was a member of the insured's household.

[**EDITORIAL NOTE.** The decision in this case tests the extent of a common exception in motorcar policies, the word to be construed being the word " household." The term " householder " is commonly used to denote an occupier of premises responsible for the rent and outgoings payable in respect of them, and it is suggested that only a householder can have a household. The term household is, however, here given a wider significance.

AS TO CONSTRUCTION OF POLICIES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 426-431, paras. 613-616 ; and FOR CASES, see DIGEST, Supp., Insurance, Nos. 3217j-3217t.]

SPECIAL CASE STATED to determine whether the sister of a man insured against certain risks in respect of his motorcar is a member of his household within the meaning of an exceptions clause in the policy. The facts are fully set out in the judgment.

B. L. A. O'Malley (for *N. A. J. Cohen*, on war service) and *J. H. C. Goldie* for the plaintiff.

C. N. Shawcross for the defendant.

BRANSON, J. : One Jack Kenneth English, who was then a lad of 17, took out a policy of insurance, which is called the British Standard Motorcar Policy, and is subscribed by Lloyd's underwriters, to cover him for certain risks in respect of a motorcar. The policy was a valid and subsisting contract on May 28, 1938, when English had a very bad accident, the result of which was that a number of people were injured and his car became a total loss. The defendant, who was one of the underwriters, and is sued in a representative capacity, has settled all the claims arising out of the accident, or has indemnified English against them, excepting a claim which is made by Rita English, the sister of Jack English, the insured. The underwriters refuse to indemnify their insured against this claim, because they say that it comes within the exclusion in sect. 5 of the policy. Sect. 5 of the policy provides that the underwriters shall pay all sums which the insured shall become legally liable to pay by way of compensation for death or bodily injury to any persons, including the passengers, occasioned by, or arising out of, the use of the car, but excluding :

> . . . (*b*) death or injury to any member of the assured's household who is being carried in or upon the car.

Those are the material words of the section, and it is said, on the one hand, that Miss English was a member of Jack English's household, and, on the other hand, that she was not, and that Jack English was an unmarried youth living at home with his father and having no household. Thus, the question is whether or not, upon the true construction of that clause in the policy, the sister was a member of the A insured's household. I think, as has been said in argument, that the question largely turns upon the way in which the language used strikes one when one first reads the words. Approaching it from that point of view, I have come to the conclusion that the underwriters' contention is correct. I think that the words " member of the assured's household " B mean a member of the same household as that of which the insured is a member, just as one speaks of a member of a man's college, and a member of a man's club, and expressions of that type. The words are completely apt to cover that construction, and, indeed, to my mind, they seem more apt to cover that construction than to cover any other. C One can see some reason for a limitation so framed, but it is very difficult to follow the reason for a limitation framed to cover a meaning such as that which the insured seeks to put upon the words. I think that one can see a reason for excluding from the benefits of a policy of this kind members of the insured's household in the sense of members of D the family living in the same house, or members of the household, giving that word a meaning rather wider than that of " family," because it must be envisaged by the underwriters that the members of a household in that sense would probably be very frequently at risk in the car, and would therefore be people who, if they were to be covered, would normally, E one would think, require some addition to the premium to cover. There is another reason, which is not for one moment suggested to be operative in a case like the present, but it is that members of the same household may be expected perhaps to bring forward collusive claims if they are hurt in an accident, throwing the blame upon the insured in order that F they may be able to recover, not from the insured, but from his insurers. That is a reasonable fear, as it seems to me. I am told that it operated with those who were settling this particular type of policy, and it gives an intelligible reason for the use of that language in the policy. I have come to the conclusion that the view taken by the underwriters is correct. G

I think perhaps it is as well, as it has had its effect on my mind, to refer to the dictionary definitions of " household " which have been cited before me. Without reading them all, I may say that I have a list here of seven, and counsel for the defendant read me another one out of the OXFORD ENGLISH DICTIONARY, in all of which the word H " household " is said to be used to signify " a family living together," " those who dwell under the same roof and compose a family," " inmates of a house collectively," and so forth. In no sense does the dictionary confine the use of the word to people who are under the domestic governance of the *pater familias*, or of somebody *in loco parentis*. The result is that I answer the question put to me by saying that in my opinion Rita English was a member of the insured's household, and therefore is excluded by the particular clause in question from benefit under the policy.

Judgment for the defendant with costs.

A Solicitors: *Edward Betteley, Smith & Stirling* (for the plaintiff); *William Charles Crocker* (for the defendant).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

B

G. T. HODGES & SONS v. HACKBRIDGE PARK RESIDENTIAL HOTEL, LTD.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **November 13, 1939.**]

C *Agency—Commission—Agent for sale of property—Property purchased under compulsory powers—Agent introducing official of authority exercising those powers.*

The plaintiffs, who had been instructed to find a purchaser for the defendants' property, were unsuccessful, and in 1934 the defendants D terminated the agency. In 1936, the plaintiffs were approached by another firm of estate agents, who were in search of a site for military purposes. The plaintiffs communicated with the defendants and arranged an interview between them and the representative of the military authorities, but no agreement was reached, although an offer was made to purchase at a price higher than the amount of the compensation eventually paid. Later, the military authorities acquired E the property under their compulsory powers at a price fixed by arbitration. The agents then claimed to be entitled to commission on the amount of the compensation awarded:—

HELD: the contract between the plaintiffs and the defendants was that the plaintiffs would effect a voluntary sale of the property, and the compulsory acquisition which in fact did take place was not within the contract, and did not entitle the plaintiffs to commission.

F

[EDITORIAL NOTE. Commission, in the case of an estate agent, can in general only be earned by the carrying out of the task with which the agent has been entrusted by his principal. There must be a contractual relationship as well as a causal one. Again, an agent who has contracted to find a purchaser does not fulfil that contract by the introduction of someone who acquires the property G compulsorily. The judgments in the present case do not, perhaps, fully support this latter statement as a proposition of law, since the fact that the compensation awarded was much below the price mentioned in the contract for a voluntary sale affords another ground for saying that the agent had not carried out his mandate.

AS TO SCOPE OF AGENCY, see HALSBURY, Hailsham Edn., Vol. 1, pp. 259, 260, para. 434; and FOR CASES, see DIGEST, Vol. 1, pp. 506-508, Nos. 1746-1752.]

H Cases referred to:

(1) *Toulmin* v. *Millar* (1887), 12 App. Cas. 746; 1 Digest 505, *1739*; 57 L.J.Q.B. 301; 58 L.T. 96.

(2) *Thompson* v. *British Berna Motor Lorries, Ltd.* (1917), 33 T.L.R. 187; 34 Digest 84, *623*.

(3) *Keppel* v. *Wheeler*, [1927] 1 K.B. 577; Digest Supp.; 96 L.J.K.B. 433; 136 L.T. 203.

(4) *Millar, Son & Co.* v. *Radford* (1903), 19 T.L.R. 575 ; 1 Digest 505, *1740*.
(5) *Nightingale* v. *Parsons*, [1914] 2 K.B. 621 ; 1 Digest 505, *1741* ; 83 L.J.K.B. 742 ; 110 L.T. 806.

Appeal by the defendants from a judgment of Lewis, J., dated May 24, 1939. The facts are fully set out in the judgment of Scott, L.J. A

B. Mark Goodman for the appellants.

R. A. B. Powell for the respondents.

Goodman : The original instructions to the plaintiffs to find a purchaser were cancelled. What happened subsequently did not amount to an employment of the plaintiffs. Further, the plaintiffs did not in fact effect the sale. A compulsory purchase at a price lower than that at B which the defendants were willing to sell does not entitle the plaintiffs to any commission. [Counsel referred to *Thompson* v. *British Berna Motor Lorries, Ltd.* (2), *Keppel* v. *Wheeler* (3), *Toulmin* v. *Millar* (1), *Millar, Son & Co.* v. *Radford* (4) and *Nightingale* v. *Parsons* (5).]

Powell : No reliance is placed on the original instructions to find a C purchaser, but the director of the defendant company accepted the plaintiffs' services by negotiating with Colonel Cannon, and was unreasonable in not accepting the price he offered, which was higher than that which was eventually fixed by the arbitrator for the compulsory sale. D

Scott, L.J. : In this case, Lewis, J., gave judgment in favour of the plaintiffs in an action for commission by a firm of house agents. In my view, the judge was wrong in the conclusion at which he arrived, because the sale of the property in respect of which the agent was claiming E a commission was a compulsory sale, the government having requisitioned the property. The price was a sum of compensation awarded by the Official Arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919.

The origin, historically, of the relations between the plaintiffs and the F managing director of the company against which the action was brought by the plaintiffs was that in 1933 the plaintiffs had been asked to find a purchaser at a minimum price of £8,750. That attempt to sell came to nothing, however, and in 1934, as is found by the judge, the relationship between the plaintiffs as commission agents for the purpose of selling G and the defendants came to an end altogether. On Nov. 11, 1936, another house agent, Whiteman, wrote to the plaintiffs as follows :

> Referring to our conversation over the telephone, we have an inquiry from a Colonel Cannon for a site of about 4 acres for the purposes of erecting a hall with sports ground attached, and we shall be glad if you can let us have particulars of H any sites available. . . . Our services are not being retained, and, in the event of business resulting, we would have to look to you for a moiety of your commission in the usual way.

That was written, of course, on the assumption that possibly Messrs. Hodges might find a vendor who was willing to sell a suitable site and earn a commission from him on a sale to which he agreed. Then on

Nov. 18 Messrs. Hodges wrote to Whiteman giving the name of the premises in question, which were the subject-matter of the action, as the Hackbridge Park Hotel, with particulars.

After that, Mr. Hodges went down to the site with Colonel Cannon and inspected the grounds, meeting the managing director of the private hotel company, the defendants in this action. In evidence Mr. Hodges stated that, before this inspection, he had had a telephone conversation with the managing director of the defendant company, Mr. Pendlebury, but the only thing said on the telephone was thus described by him :

> I rang Mr. Pendlebury and told him I had an applicant. I asked him whether I could show him over the grounds and he said yes.

Three inspections took place altogether, and the price which Pendlebury was asking at that time was nearly twice what he had asked in 1933. It was £15,000. Colonel Cannon said that he was not going to buy at that price. He got Pendlebury to come down to £12,500, but he was not going to purchase at that price because he had learnt from Hodges that Pendlebury's original figure had been £8,750.

Then the matter went off, and, so far as Hodges' claim to bringing about a sale for Pendlebury is concerned, nothing further happened, because Colonel Cannon, who was really investigating directly or indirectly on behalf of the War Office, reported about the place to the War Office, with the result that the War Office requisitioned the whole estate under statutory powers, and an arbitration took place before the official arbitrator at which a price of between £7,000 and £8,000 was fixed by the arbitrator for the compulsory purchase.

On those facts, the plaintiffs have no evidence to show that they earned any commission, even if they have material upon which, had there been a voluntary sale, I think there would have been evidence of their being entitled to a commission. In the absence of a voluntary sale, however, there was no contractual relationship between what they did and the transfer of the estate under compulsion to the government as the purchaser. It makes the rule laid down by LORD WATSON in *Toulmin* v. *Millar* (1) directly applicable. In that case, which was a claim for commission on the sale of an estate by the plaintiff, who was a London estate agent, LORD WATSON says [58 L.T., at p. 96] :

> It is impossible to affirm, in general terms, that A. is entitled to a commission if he can prove that he introduced to B. the person who afterwards purchased B.'s estate, and that his introduction became the cause of the sale. In order to found a legal claim for commission, there must not only be a causal, there must also be a contractual relation between the introduction and the ultimate transaction of sale.

It is just that gap which existed in the facts of this case. In a certain sense, Mr. Hodges had been the causal connection between the defendant company and the War Office, the compulsory purchaser, but there was no contractual relationship between him and the defendant company which would entitle him to say : " According to the terms of my employment by you, I have found for you a ready and willing purchaser at a price which you have voluntarily accepted." It is just those elements which are the elements necessary under the contract to entitle the plaintiff to his commission and which in this case were absent by reason of the facts.

The facts, quite shortly, were that Mr. Pendlebury for the defendant company said: "I am not willing to sell for less than £12,500." The next event in the transaction was, no doubt, that that figure was reported to the War Office, who said: "That is ridiculous. We are not going to pay that. We will give notice to treat under the compulsory powers in the Acquisition of Land Act." That led to the fixing of the compensation. In my opinion, the judge erred in thinking that, because in effect Mr. Hodges may have been the originating cause, he was therefore contractually entitled to commission. The appeal must be allowed with costs here and below.

Clauson, L.J.: I agree. Put at its highest, the relationship between the defendants and the plaintiffs was such that, if the plaintiffs had procured a purchaser for the defendants' property at a price which the defendants were willing to accept, the defendants would have been bound to pay them a commission for selling it. What the plaintiffs in fact did was to start a train of causes which ultimately led to the defendants' property being taken away from them against their will in exchange for compensation at a figure some £4,000 or more less than the price which the defendants were asking, and some £900 less than the lowest figure they had ever at any time contemplated accepting. How that can result in a liability upon the defendants to pay commission to the plaintiffs I must confess I fail to understand.

Goddard, L.J.: I agree. If you employ a house agent to undertake the sale of your property for you, the last thing you employ him to do is to find a person who requires you to sell your property to him at a price which you are not willing to accept. When Messrs. Hodges were approached by Messrs. Whiteman and were told that they had a client, a Colonel Cannon, who was looking for some land for the purpose of erecting a hall with a sports ground, and asked if they knew of any suitable property, they wrote back mentioning the defendants' property, and, by arrangement with Messrs. Whiteman, and with the defendants' permission, Colonel Cannon was shown round the property by Messrs. Hodges, and then Pendlebury mentioned a price which ultimately came down to £12,500, if Colonel Cannon had been willing to pay that price either out of his Territorial Association's funds, quite apart from the War Office, or out of his own pocket, I have no doubt that the plaintiffs would have been entitled to commission, because they would have introduced a person who was willing to pay the price asked by Pendlebury, and Pendlebury would have accepted that person as the purchaser, and thereby have taken advantage of their efforts.

Unfortunately, however, that is not what happened at all. Colonel Cannon was not willing to pay the price asked, which was the only price at which Pendlebury was willing to sell at that time. Thereupon, the government intervened. In exercise of the statutory powers vested in the Secretary of State, they served a notice to treat on the defendant. Directly a notice to treat is served, however, although for certain purposes a notional contract is entered into between the undertakers and the person on whom the notice is served, there is no contract in the true sense at all, and any question of commission is removed from the scope of the transaction. From that moment, it becomes a question of the so-called purchaser being in a position to expropriate the owner, whether he likes it or not, on paying a price which used to be fixed by arbitration under the Lands Clauses Act and is now fixed under the Acquisition of Lands Act. That state of affairs, which ultimately came about, in one sense was due to the efforts of Hodges, but, as I have said, you do not employ a house agent to effect a transaction which is a disservice to you. You employ him to effect a transaction which is of service to you, and, in the circumstances, which ended in the defendants being expropriated from their premises and land and having to accept a price at which they were not willing to sell, it is impossible to say that the plaintiffs have earned a commission out of any employment which was conferred upon them by the defendants.

Appeal allowed with costs in both courts.

Solicitors: *William Charles Crocker* (for the appellants); *Lees, Smith, Crabb & Matthew* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Criticised by DENNING, L.J. OLIVER *v.* DAVIS. [1949] 2 All E.R. 353.

AYRES *v.* MOORE.

[KING'S BENCH DIVISION (Hallett, J.), **November 14, 15, 16, 1939.**]

Bills of Exchange—Liability of parties—Acceptor—Acceptance under a mistake of fact—Acceptance procured by fraud of third party—Bill incomplete when accepted—Bills of Exchange Act, 1882 (*c.* 61), *s.* 29 (i).

The plaintiff was the holder of bills of exchange which were incomplete when he received them, the name of the drawer not having been inserted. The defendant had accepted the bills upon a representation that the money was required to purchase patents in which both the defendant and one F. were interested, but in fact the money was required in respect of personal loans to F. The defendant contended that he had given his acceptance under a mistake of fact, which, if true, would not have rendered him liable to accept the bills, but would merely have made it desirable that he should do so. He also contended that the acceptance was procured by fraud, and that the plaintiff was tainted with the fraud. The plaintiff alleged in reply that the defendant was precluded from setting up the fraud:—

HELD: (i) the defendant could not rely on his mistake of fact, as, if it had been true, it would not have affected his liability to accept the bills, but merely have made it desirable that he should accept the bills.

(ii) the plaintiff, not being a holder in due course, was affected by the fraud of the third party.

(iii) the plaintiff could not rely on the estoppel, as it was not pleaded.

[**EDITORIAL NOTE.** The principles upon which money paid voluntarily under a mistake of fact can be recovered have been considered in a well-known line of decisions, and the present case is concerned with the application of those principles to the case of an acceptance of a bill of exchange under such a mistake of fact. In the result, it is held that the mistake must be one which, if true, would have affected the liability to accept the bill.

As to Liability of Acceptor of Bill of Exchange, see HALSBURY, Hailsham Edn., Vol. 2, pp. 668-670, paras. 928-932 ; and for Cases, see DIGEST, Vol. 6, pp. 299-305, Nos. 1996-2041.]

Cases referred to :

(1) *Aiken* v. *Short* (1856), 1 H. & N. 210 ; 35 Digest 148, *461* ; 25 L.J.Ex. 321 ; 27 L.T.O.S. 188.

(2) *Kelly* v. *Solari* (1841), 9 M. & W. 54 ; 35 Digest 151, *487* ; 11 L.J.Ex. 10.

(3) *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276 ; 35 Digest 147, *457* ; 73 L.J.Ch. 198 ; 89 L.T. 694.

(4) *Morgan* v. *Ashcroft*, [1938] 1 K.B. 49 ; [1937] 3 All E.R. 92 ; Digest Supp. ; 106 L.J.K.B. 544 ; 157 L.T. 87.

(5) *Jones (R. E.), Ltd.* v. *Waring & Gillow, Ltd.*, [1926] A.C. 670 ; 35 Digest 149, *470* ; 95 L.J.K.B. 913 ; 135 L.T. 548.

(6) *Watson* v. *Russell* (1864), 5 B. & S. 968 ; 6 Digest 87, *643* ; 34 L.J.Q.B. 93 ; 11 L.T. 641.

Action on five bills of exchange brought by the payee and holder against the acceptor. The defendant was the acceptor of five bills of exchange each for £500 drawn by the plaintiff to his own order. The defendant's acceptance had been procured by one Fisher, who had represented to the defendant that the bills were needed as security for money advanced by the plaintiff for the purchase of patents in which both the defendant and Fisher were interested. In fact, the money advanced by the plaintiff was in respect of personal loans to Fisher. The defendant discovered the true facts and accordingly dishonoured the bills on presentation. It was found that the plaintiff was not a holder in due course of the bills, both because he was an immediate party and because his name as drawer had not been inserted when he took the bills.

P. L. E. Rawlins (for *Maurice Lyell*, on war service) for the plaintiff.

N. L. C. Macaskie, K.C., and *B. L. A. O'Malley* for the defendant.

Hallett, J. : The grounds upon which the defendant has relied for avoiding his *prima facie* liability may be summarised as follows. In the first place, he says that there was no consideration entitling the plaintiff to sue upon these bills, and he has pointed to the fact that the consideration alleged in the further and better particulars of the reply was :

> The said bills were taken in part satisfaction of the indebtedness of the said Fisher to the plaintiff and in consideration of the plaintiff forbearing to press the said Fisher for repayment of his said indebtedness during the currency of the said bills. The said terms were agreed orally between the said Fisher acting as agent of the defendant and on his own behalf and the plaintiff at some date in Mar.,

1938, shortly before the delivery of the said bills to the plaintiff by the defendant which the plaintiff is unable to particularise.

I think it sufficiently appears from what I have already said that there is no evidence of any express agreement, oral or otherwise, between Fisher and the plaintiff that, in consideration of being given the bills, A the plaintiff would forbear to press Fisher for repayment of his indebtedness to him during the currency of the bills, and the fact that there is no such evidence gives some colour, perhaps, to the first ground upon which the defendant relies. Nevertheless, in my judgment, there was a good and valid consideration operating in favour of the plaintiff for B these bills. I do not think that the consideration which has *prima facie* to be presumed has been in any way displaced by anything which has been put before me.

Under the Bills of Exchange Act, 1882, s. 27, valuable consideration for a bill may be constituted by (*a*) any consideration sufficient to C support a simple contract, or (*b*) an antecedent debt or liability. Here there is unquestionably, on the accepted facts, an antecedent debt or liability. There was an antecedent debt or liability to the plaintiff amounting to £3,780, and, although there may have been no express agreement to forbear, I think that, in the present state of the authorities, there can D be no doubt that there was sufficient consideration for the giving of the bills. I think that the bills operated as a conditional payment of the past debt, and, therefore, without an express agreement, that point fails.

The next point on which the defendant relies is this. The defendant E says that he gave these acceptances under a mistake of fact. I find, as a fact, that he did do so. He did give these acceptances, in my judgment, under a mistake of fact, and it has been contended on his behalf that, therefore, having now discovered the mistake, he can properly claim to be released from his liability on the acceptances. F In my judgment, that ground also fails. The authorities to which I have been referred, and those which I have myself mentioned, are all, I think, with regard to this part of the matter, authorities where the claim was a claim for money had and received based upon an allegation that the money had been paid under a mistake of fact. As regards G such a claim, it was decided by BRAMWELL, B., in *Aiken* v. *Short* (1), at p. 215:

> In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money.

H That statement seems to me to be in accord with what had been stated previously by PARKE, B., in *Kelly* v. *Solari* (2), at p. 58:

> I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it . . .

The significant words there are "which would entitle the other to the money."

Following upon *Aiken* v. *Short* (1), there comes *Re Bodega Co., Ltd.* (3), where FARWELL, J., at p. 286, refers to what BRAMWELL, B., had said in *Aiken* v. *Short* (1) and treats it as being still good law.

However, the matter is really put beyond doubt by *Morgan* v. *Ashcroft* (4), where the Court of Appeal, considering an appeal from a county court, reviewed these and other cases, and I read the judgments of SIR WILFRID GREENE, M.R., and SCOTT, L.J., as once more recognising the soundness of what was laid down in *Aiken* v. *Short* (1), although SCOTT, L.J., does point out that the actual language used in *Aiken* v. *Short* (1) is not perhaps quite wide enough to cover all the cases where a mistake of fact will give rise to a right to recover the money paid as money had and received. SCOTT, L.J., puts it in this way, at p. 77 ([1937] 3 All E.R., at p. 105):

> But I am in complete agreement with SIR WILFRID GREENE, M.R., that there is a plain principle applicable to all those cases of payments in mistake of fact, and that is that the mistake must be in some aspect or another fundamental to the transaction. On the facts of this case there was no fundamental mistake.

I need not refer in detail to those judgments. There they are, to be read and profited from. SCOTT, L.J., however, was considering a case where there was a mistake as to the nature of the transaction. In such a case, it may be that the language used in the earlier cases would not be entirely applicable, and yet the mistake would be of such a character as to entitle the person paying to recover the money back.

Another case to which I have been referred, and which has required my attention, is *Jones (R. E.), Ltd.* v. *Waring & Gillow, Ltd.* (5), but there again the claim was a claim to recover money paid, as it was said, under a mistake of fact, because in that case the cheque had been honoured, whereas in this case the bills of exchange, as I have said, had been dishonoured, and LORD SUMNER, in particular, points out that there may be a distinction. He says, at p. 695:

> It is not necessary to decide whether Waring & Gillow, Ltd., could have sued on the £5,000 cheque, as holders in due course, since the cheque was paid.

Then he goes on to discuss the question which he had to decide as to whether the money, having been paid without any obligation and under a mistake of fact, could be recovered back.

In the present case, in my judgment, the fact as to which the defendant was mistaken when giving his acceptances was not a fact affecting his liability within the meaning of the passages I have read from the earlier cases, such as *Aiken* v. *Short* (1), nor a fact fundamental in the sense in which that word is used by SCOTT, L.J., in *Morgan* v. *Ashcroft* (4). As to liability, I do not think that there can really be any doubt, assuming that the plaintiff had advanced this money to Fisher for the purpose of acquiring patents or incurring expenses in connection with them even for the British Kanteb Co., which was the only one of all

Fisher's companies with which the defendant was connected. It is quite clear that the defendant was under no sort of liability, legal or even moral, to provide ways and means of repaying the plaintiff's loan. The distinction is put thus in KERR ON FRAUD AND MISTAKES, 6th Edn., p. 636 :

> The mistake must be a mistake as to a fact which if true would make the person paying liable to pay the money, not where if true it would merely make it desirable that he should pay the money.

As regards the first half of that sentence, it may require some slight expansion. As regards the second half, it might make it desirable that the defendant should provide for the debt of Fisher to Ayres. The reason why the defendant was willing to do this, as I understand it, was that he himself had advanced considerable sums to Fisher for the purpose of acquiring the patent, and, unless the acquisition were completed, that money might very well be lost, and he therefore thought that it was in his own interest that he should assist Fisher to stave off the trouble with the plaintiff which might otherwise occur. That falls eminently within the second category of mistake, rather than within the first.

I have to observe very carefully that this is not an action by a person who has paid money to recover the money as having been paid under a mistake of fact. The person who would be the plaintiff in such an action is here the defendant resisting an action brought upon the contract to compel him to pay the money, and—rather curiously, it seems to me—the researches of counsel have not succeeded in bringing to my notice any case which provides me with an authority upon that aspect of the matter as distinct from authorities dealing with claims for money had and received.

I recognise that there are obvious distinctions between the two kinds of action, but, applying my mind to the matter as best I can, I think that, in a defence which seeks to repudiate liability upon a contract contained in a bill of exchange by reliance upon the allegation that such a contract was entered into under a mistake of fact, it is at least as necessary as in an action to recover back money paid as money had and received to show that the mistake was as to a fact affecting the liability, or, at any rate, fundamental in the sense in which SCOTT, L.J., has, I think, used that term in *Morgan* v. *Ashcroft* (4). I do not think that a repudiation of liability can be based upon an allegation of a mistake of the kind I find to have existed in the mind of the defendant in the present case.

The next question which arises is as to whether or not there is any other ground upon which the defendant can escape his *prima facie* liability. The third ground suggested is this. He says : "My acceptance was obtained by the fraud of Fisher, and that fact is sufficient to enable me to repudiate the contract into which I entered by means of that acceptance." It is upon that aspect of the matter that the argument has very largely turned. In my judgment, that contention is correct. There may be circumstances where the fact that a contract on a bill has been procured by fraud does not enure to the disadvantage of the holder of the bill. I need not examine or inquire into every possible set of circumstances. It is sufficient, I think, if I mention two. In the first place, it has been the policy of the legislature to protect by certain provisions the negotiability of certain classes of instrument, and, for business reasons which are quite obvious, protection has been given to those who have acquired under certain conditions negotiable instruments, although those negotiable instruments may, at some earlier stage in the transaction, have been tainted with fraud. Therefore, if a plaintiff in a case is what is called a holder in due course, his position may be very different. However, counsel for the plaintiff, after inquiry into this aspect of the matter, conceded that the plaintiff is not a holder in due course of these bills, and, in my view, that was a very proper concession. I need mention only two reasons why I say that. The first is that, as I have already pointed out, the bills, when taken by the plaintiff, were incomplete, inasmuch as there was no name of the drawer inserted therein, and the definition of a holder in due course which is to be found in the Bills of Exchange Act, 1882, s. 29 (1), is as follows:

> A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions. . . .

This bill was taken by the plaintiff when it was not complete. The second reason why I think counsel for the plaintiff was correct in making that concession was that, after a great deal of discussion and doubt, it has now been finally decided, it seems to me, that the original payee of a bill—in this case, the drawer, namely, the plaintiff—cannot be a holder in due course. That appears, as it seems to me, from the decision in *Jones* (*R. E.*), *Ltd.* v. *Waring & Gillow*, *Ltd.* (5). There was some difference of opinion about it before, but I think that that case finally disposes of that point. The plaintiff, therefore, is not protected by being a holder in due course. Another set of circumstances which may protect the holder of a bill is that existing where there has been something in the conduct of the defendant which in point of law precludes the defendant from relying upon the defect which he alleges. In other words, there may be conduct on the part of the defendant which estops him from setting up a defence—at any rate, as against the plaintiff—which would otherwise succeed.

If I may come to the details in *Jones* (*R. E.*), *Ltd.* v. *Waring & Gillow*, *Ltd.* (5), in that case the majority of their Lordships—because the minority, VISCOUNT CAVE, L.C., and LORD ATKINSON, differed from the majority—express their opinion in favour of the defendants on the ground that the plaintiff was estopped by reason of his conduct from recovering the money. In this case, I can see no ground for alleging that the defendant is estopped from setting up the defence based upon fraudulent representation which he desires to set up. I do not think

I need examine the facts in detail, or compare them in detail with the facts in *Jones* (*R. E.*), *Ltd.* v. *Waring & Gillow*, *Ltd.* (5), but this I ought to say plainly, because it may be of importance. It has been sought by counsel for the defendant to suggest that Fisher should be regarded as the agent of the plaintiff. In my judgment, I think that that is quite wrong. I do not think he was his agent in fact or in law. I do not think that, if a creditor wants his debtor to produce the money owing to him, and the debtor goes to some third person and makes statements to him with a view to inducing him to provide the required security, it is right, either in law or as a matter of common sense, to say that the debtor is the agent of the creditor in making those statements to the third person. I think that this is quite a different case from the kind of case which was shown to exist, for instance, in *Watson* v. *Russell* (6), where Keys was the agent to make the payment in question.

On the other side, it has been suggested by counsel for the plaintiff with a good deal of vigour that Fisher was the agent of the defendant, and of the two propositions I think that that one is plainly the more reasonable, because Fisher was to this extent entrusted by the defendant with the conduct of the matter, on the defendant's story but not on the plaintiff's story, and the defendant did give the bills to Fisher to hand over to Ayres. Again, however, I do not think that in any real sense the defendant made Fisher his agent.

There are further difficulties in the way of the plaintiff. The plaintiff sought to rely on estoppel. If one assumes that the plaintiff desired to say that the defendant was estopped from relying upon this defence by his conduct, it was clearly necessary for the plaintiff to plead that estoppel with particularity. The plaintiff should have set out in his pleadings what was the actual conduct of the defendant which he relied on as constituting the representations made by the defendant to the plaintiff, and he should have gone on to plead what were the acts to the detriment of the plaintiff which the plaintiff did in reliance on the defendant's representations.

At the invitation of counsel for the plaintiff, I re-read the amended reply, which was the first pleading delivered by the plaintiff, and I also re-read two sets of particulars delivered by the plaintiff, one on Mar. 16, 1939, and the other on July 21, 1939, and, having re-read every word of those three documents, I cannot find any pleading which can be regarded as covering satisfactorily, or as covering at all, an allegation of estoppel. Secondly, if one assumes that an estoppel had been pleaded, it would then have been necessary for evidence to be given in support of that plea. It would have been necessary, for instance, for the plaintiff to establish by some evidence, not merely that the representations had been made to him by the conduct of the defendant, but also that he had relied upon those representations, and relied upon them to his detriment. However, as I have already pointed out, no such evidence has been forthcoming. I have had no evidence from the plaintiff, but it is only fair to counsel for the plaintiff to say that I do not think that, if the plaintiff had gone into the box, he would have been able to establish anything amounting to estoppel. It is sufficient to say that no estoppel has been pleaded, and, therefore, so far as estoppel is concerned, it seems to me that the defendant is not precluded from relying upon this defence.

There remains, I think, only one point for consideration. Again it is a point not entirely free from difficulty. It is strenuously contended that the fact that the acceptance was procured by the fraud of a third party is not sufficient to entitle the defendant to repudiate his obligation as against the plaintiff. The proposition of counsel for the plaintiff, if I correctly understood it, is that it must be shown that the plaintiff was actually or notionally guilty of complicity in the fraud before that fraud can operate against the plaintiff. The principal may be responsible for the fraud of his agent, although free from all moral complicity in what was said. If that were the position, if it were necessary for an immediate party to be personally tainted by the fraud in order that he might be deprived of his rights under the bill, then a great many of the provisions which the legislature have thought fit to enact, and a great deal of discussion and argument in the cases, would be superfluous.

In my view, it is precisely because a holder of a bill may be affected, although personally innocent of fraud, that there are those provisions for protecting a holder in due course. I do not think that the immediate party is likewise protected, and, in my judgment, although no very clear authority has been cited to me, he is not. I therefore come to the conclusion that, on the three grounds of defence raised on behalf of the defendant, two fail but one succeeds. I think that the defence of no consideration fails. I think that the defence that this obligation can be repudiated because it was entered into under a mistake of fact also fails, in so far as it is a separate ground from the ground based on fraud, but I think that, the acceptance having been obtained by fraudulent representation, and the obligation having been repudiated as soon as might be after the fraud was discovered, the defendant is entitled to judgment in this action, which I give him accordingly, with costs.

Judgment for the defendant with costs.

Solicitors: *Wilberforce Allen & Bryant*, agents for *F. S. Collinge & Co.*, Colchester (for the plaintiff); *Gibson & Weldon* (for the defendant).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

GODDARD & SMITH *v.* FREW.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **November 20, 1939.**]

Insurance—Indemnity policy—"All losses"—Loss due to embezzlement by employee.

The plaintiffs insured themselves with the defendant and other underwriters against "all losses, costs, charges and demands whatsoever by reason of any act, neglect, omission, misstatement or error whenever or wherever the same was or may have been done, committed or omitted or made or written or alleged to have been done, committed or omitted or made or written on the part of the firm or any person employed by the firm in or about the conduct of any business conducted by or on behalf of the firm in their professional capacity as auctioneers, house and estate agents." An agent of the plaintiffs collected the rents of certain property belonging to a third party and embezzled them. The plaintiffs paid the amount of the defalcations and then claimed under the policy for that amount:—

HELD: upon its proper construction, the policy was an indemnity policy, and not a fidelity policy, and a loss due to embezzlement by an employee was, therefore, not covered by the policy.

[**EDITORIAL NOTE.** In this case, there was considerable argument upon the point whether the plaintiffs could insure themselves against the crime of a servant, various authorities being cited to show that this was against public policy. The Court of Appeal, however, have not found it necessary to consider this point, and base their decision upon the ground that, if the loss in question was to be covered, the policy must be, upon its proper construction, a fidelity policy. The court is clear that the policy was not, upon its proper construction, a fidelity policy.

AS TO FIDELITY INSURANCE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 507, 508, paras. 787, 788; and FOR CASES, see DIGEST, Vol. 29, pp. 409-413, Nos. 3218-3243.]

Cases referred to:

(1) *Haseldine* v. *Hosken*, [1933] 1 K.B. 822; Digest Supp.; 102 L.J.K.B. 441; 148 L.T. 510.

(2) *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716; 34 Digest 129, *991*; 81 L.J.K.B. 1140; 107 L.T. 531; *revsg.*, [1911] 2 K.B. 489.

APPEAL by the plaintiffs from an order of His Honour C. M. PITMAN, K.C., official referee, dated May 17, 1939. The facts are fully set out in the judgment of SCOTT, L.J.

John W. Morris, K.C., and *Colin H. Pearson* for the appellants.

Philip Vos, K.C., and *Frank Soskice* for the respondent.

SCOTT, L.J.: This is a claim against an underwriter defending in a representative capacity on a Lloyd's policy of insurance, dated Apr. 9, 1937. It is an indemnity policy, and not a fidelity policy, and it is to be noted here that from the outset the policy was against losses caused to the assured by demands or actions made or brought against them when the circumstances in which the action was brought were such that the cause of action arose from various acts or omissions for which the firm themselves had been responsible, either personally or through a person employed by them acting in and about their business as estate agents.

Before looking at the terms of the policy, I may say that the facts were these. The plaintiff firm of Goddard & Smith had agreed as estate agents to collect the rents of properties at Mortlake on behalf of the Covent Garden Properties Co., Ltd., and to pay the rents, as soon as they were collected, into the local branch of a London bank at Mortlake, and that the bank should at once cause the amounts received to the credit of that particular account to be transferred to an account at the head office of the bank in London kept by Goddard & Smith under the title of Account No. 58 into which the rents collected by them for the Covent Garden Properties Co., Ltd., and no other moneys at all were to be paid. It was an account which no doubt was a trust account for Covent Garden Properties Co., Ltd. All went well for a time until one Reynolds, who had been employed by Messrs. Goddard & Smith to live down at Mortlake for the express purpose of collecting these rents week by week A and paying them into the local bank, instead of paying in the whole amount which he received in the course of some time, which does not appear, embezzled £2,700 odd. When this fact became known to the Covent Garden Properties Co., Ltd., through their not receiving notice of the due payment of the rents into their head account in London, they B made demand upon Messrs. Goddard & Smith to pay over the amount which had been received by Reynolds, the rent collector of Goddard & Smith, and not accounted for—namely, the £2,700. Those, I think, are all the facts, except that, on looking into the matter, Messrs. Goddard & Smith very properly at once paid out of their own pockets the amount C of the defalcations to the landlords.

On Apr. 9, 1937, they had taken out a policy at Lloyd's for a year, which covered the time in question, known as an indemnity policy, of which there is only a small part that I think it necessary to read. There is a recital in the policy to this effect: D

> Whereas Messrs. Goddard & Smith have paid the amount of the premium to us the undersigned to insure them from all losses, costs, charges and expenses arising from all actions, proceedings, claims and demands whatsoever . . . by reason of any act, neglect, omission, misstatement or error whenever or wherever the same was or may have been done, committed or omitted or made or written or alleged to have been done, committed or omitted or made or written on the E part of the firm . . . or any person . . . employed by the firm . . . in or about the conduct of any business conducted by or on behalf of the firm . . . in their professional capacity as auctioneers, house and estate agents.

I have omitted irrelevant words. That is the recital, and then the operative part continues as follows:

F

> Now know ye that we, the underwriters, do hereby bind ourselves . . . to pay to the firm . . . all such losses, costs, charges and expenses arising from any cause as aforesaid, not exceeding the sum of £50,000.

That is the whole of the policy that is material.

The question in this case is, therefore, whether or not the facts that I have narrated fall within the words G

> . . . losses . . . arising from . . . demands . . . by reason of any act . . . omission . . . done, committed or omitted . . . on the part of the firm [or an employee of the kind specified].

It was argued below before the official referee, C. M. Pitman, K.C., that they were entitled to recover in an action brought which was referred to him H for trial. He decided against the plaintiffs in favour of the underwriters, partly on the ground of public policy, that it was not right that the plaintiff should have the benefit in any way, directly or indirectly, of a criminal act of embezzlement by their servant. He quoted various cases about it, but I do not think it is necessary to consider his judgment in detail, because, in our view, the question of public policy does not arise at all. We think that the case depends entirely on the interpretation of the words of the policy itself, and I personally am satisfied that this policy does not cover the events I have narrated. The real cause of the loss of the firm was embezzlement by their servant. That was the true proximate cause of the loss, and, in my view, as this is not a fidelity policy, but only an indemnity policy against certain carefully described liabilities, the loss cannot be brought within this policy. If the landlords, the Covent Garden Properties Co., Ltd., instead of having their demand met at once, had had to take legal proceedings, I am sure that, if counsel for the appellants had drawn the statement of claim or writ, he would have made it one for money had and received, and, on the facts of the case, I think that there would have been no answer. It would have been quite immaterial to the statement of claim to put in allegations about a fraud committed by the employee Reynolds. It would have been quite sufficient that the firm of Goddard & Smith had received the money through their employee and had not accounted for it, and judgment against them would necessarily follow on that, and on nothing else. Had they put up the defence that the money had been embezzled by Reynolds, that would have been demurrable, as wholly irrelevant to the cause of action, which would have depended solely on two facts—namely, (i) receipt of the money, and (ii) failure to hand it over. That being so, I do not think it possible to say that the insured have proved that they have suffered a loss, and that that loss arises from a demand brought against them, which demand, or which loss, has occurred by reason of the acts of their employee Reynolds, and, unless that can be established in this action, there is no claim on the policy. In my view, the words in this policy which I have read do not cover the facts here, for which a fidelity guarantee was needed, and for which an indemnity policy in these terms was no protection. For those reasons, I think that the appeal of the plaintiffs must be dismissed.

CLAUSON, L.J.: I agree.

GODDARD, L.J.: I agree, and I would like to add one word, because, although this case has not been fully argued, and we have not found it necessary to call on the respondent, I want to guard against its being supposed that I agree with the grounds upon which, as I understand it, this case was decided below. To my mind, the case is a very simple one, and depends entirely upon the question whether this is a fidelity policy or a policy to insure against negligence, and possibly other things. To my mind, it is perfectly clear that it is a policy of the second class. It does not insure the employer against losses which he may sustain by reason of the default of his servant. It insures him against losses which may be caused to him by reason of actions, proceedings, claims and demands brought by reason either of his own acts and defaults or of those of his servants. In this case, the demand which was made was simply because Messrs. Goddard & Smith, having collected rents and given receipts in the ordinary way, so that the tenants would not have to pay them again, had moneys in their hands, or must be taken to have had moneys in their hands, for which they were liable to account, and for which they did not account, and it was no defence to say to the landlords, their principals: "Our servant has embezzled the money." That is no defence at all. The demand was a demand to have paid over the money which had been collected, and the demand of the landlords did not arise by reason of any act, neglect or omission on the part of a servant at all. It was simply because they had not paid over the money which was in their hands.

The official referee dealt with this case on different lines, and he seems to have based his decision mainly on *Haseldine* v. *Hosken* (1), because he said this:

> If a person cannot insure himself against a claim by a third party in respect of a crime committed by himself in ignorance that it was criminal, nor can he, in my opinion, insure against a claim by a third party in respect of a crime committed by his agent carrying on his business on his behalf and acting within the scope of his authority.

Then he says that it is difficult to say that Reynolds, "in embezzling the rents, was doing an act within the scope of his authority." With great respect, I cannot agree with that, because that would be to ignore entirely *Lloyd* v. *Grace, Smith & Co.* (2) and a great many other cases. He went on to say that the plaintiffs were in a dilemma:

> If the person employed by them caused the loss by a criminal act which was entirely outside the scope of his authority, and outside their business of a house or land agent, then such loss would be outside the risk covered by the policy . . .

So far, I agree, but, of course, the act here was an act committed within the scope of his authority. He continues as follows:

> . . . and, if the act were within the scope of his authority, then the true state of affairs is as originally pleaded, before the amendment of the statement of claim. That is to say, "the plaintiffs by the said Reynolds acting as aforesaid misappropriated the said sum." If they so acted, they, just as the "innocent" plaintiff in *Haseldine* v. *Hosken* (1) was, are precluded from recovering under this policy the sum so misappropriated by them through their agent.

If the official referee means to hold that one cannot insure oneself against consequences which may happen to one because one's servant embezzles money, I very respectfully disagree. I think that the official referee went much too far in laying down those propositions. *Haseldine* v. *Hosken* (1) follows a well-known line of cases which says that one cannot insure oneself against the commission of a crime by oneself, but, if the law be as stated by the official referee, it would follow in most cases that fidelity insurance would be quite illusory, and that cannot be right. If I insure myself against the defalcations of my servant, surely I am entitled to recover under the policy if he embezzles money for which I have to account to a principal. I should have thought that that was clear, and it is what so often happens in the case of a fidelity policy.

I wanted to add what I have added—in my opinion, the case itself is a perfectly clear one on the ground which has been stated by Scott, L.J.—only lest it should be thought that I was agreeing with all that the official referee had said. As at present advised, I emphatically do not.

Appeal dismissed with costs.

Solicitors: *Lee, Bolton & Lee* (for the appellants); *William Charles Crocker* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

SCHAFFER *v.* ROSS.

[COURT OF APPEAL (Slesser and Luxmoore, L.JJ., and Atkinson, J.), **November 21, 1939.**]

Landlord and Tenant—Rent restriction—" A house or part of a house let "—House not let before 1928*—No registration of house as decontrolled—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (*c.* 17), *s.* 12 (2)*—Rent and Mortgage Interest Restrictions Act,* 1923 (*c.* 32), *s.* 2 (1) *—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1938 (*c.* 26), *s.* 4.

The plaintiff was owner of a house which was in the occupation of the owners from 1904 until 1928, when it was let for the first time since the passing of the Rent Restrictions Acts. In 1937, it was let to the defendant, and this tenancy was determined by notice to quit expiring on May 6, 1939. The rateable value was at all material times such as to bring the premises within the Acts. No application for registration under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 4 (1), as a decontrolled house, had been made within the prescribed time. The defendant contended that the house was controlled:—

HELD: (i) sect. 12 (2) of the Act of 1920 should be read as if the word " let " governed the whole of a house as well as part of it.

(ii) there was nothing in the Act of 1920 to limit the application of sect. 12 (2) to a house which was let as a separate dwelling at the time of the passing of the Act, and accordingly it would apply, apart from the provisions of the 1923 Act, to a house first let in 1928.

(iii) the word " landlord " in sect. 2 (1) of the Act of 1923 does not necessarily imply the existence of a tenancy. The plaintiff therefore brought himself within sect. 2 (1) of the Act of 1923 as being a landlord to whom the principal Act applied.

(iv) the plaintiff having, however, failed to register under, or bring himself within, the saving clauses of the Act of 1938, the house was a controlled house.

[**EDITORIAL NOTE.** The substantial point argued here is whether the word " let " in sect. 12 (2) of the Act of 1920 restricted the operation of the Act to houses then in fact let to tenants or whether houses not then in fact let but which are subsequently let are also subject to the Act. It is decided that the latter construction is the correct one. There is the further important question whether a house not let at the time of the passing of the decontrolling Act in 1923 is decontrolled by that Act, but this is held to have been implicitly, if not expressly, decided in *Lloyd* v. *Cook* (2). Such a house is decontrolled by the Act of 1923 and is, therefore, subject to the later provisions regarding registration.

AS TO PROPERTIES TO WHICH THE ACTS APPLY, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, Nos. 368, 369; and FOR CASES, see DIGEST, Vol. 31, pp. 557, 558, Nos. 7042-7053.]

Cases referred to:

(1) *Brooks* v. *Brimecome*, [1937] 2 K.B. 675; [1937] 2 All E.R. 637; Digest Supp.; 157 L.T. 417.

(2) *Lloyd* v. *Cook, Goudge* v. *Broughton, Simson* v. *Miatt, Bartram* v. *Brown, Barker* v. *Hutson*, [1929] 1 K.B. 103; Digest Supp.; 97 L.J.K.B. 657; 139 L.T. 452.

Appeal by the defendant from an order of His Honour Judge Tudor Rees given at the Whitechapel County Court and dated July 31, 1939. The facts are fully set out in the judgment of Slesser, L.J.

S. N. Bernstein for the appellant.

D. Weitzman for the respondent.

Slesser, L.J.: In this case, the plaintiff, Schaffer, claims possession of a dwelling-house, No. 19, Head Street, Commercial Road, E.1, which is held from him by the defendant, Mrs. Ross, on a weekly tenancy of £1 8*s.* per week. This tenancy was terminated by notice to quit in writing given by the plaintiff to the defendant on Apr. 27, 1939, expiring on May 6, 1939. There is a claim of £8 8*s.* arrears of rent from May 6, with mesne profits at the rate of £1 8*s.* per week. The defendant admits that she is in possession as a weekly tenant of the premises, but she denies that the plaintiff is entitled to possession of the premises. She says that the premises are controlled and subject to the Rent and Mortgage Interest (Restrictions) Acts. Then there is a counterclaim by her, because she says that, on the basis that the premises are so controlled and subject to the Acts, she has paid more rent than she can be required to pay in accordance with those Acts. She counterclaims in all for £31 8*s.* 4*d.*, and claims to set off the arrears of her rent in diminution of her claim as therein set out. The judge in his judgment, as I read it, has come to the conclusion that this dwelling-house is not controlled at all. In the circumstances of the case, if that view be correct, as he says, the application of problems as to standard rent and the like does not arise.

The first question which arises for consideration in this court is whether the judge was right in coming to the conclusion that this house was not within the ambit of the Rent and Mortgage Interest (Restrictions) Acts at all. The material facts of the case are these. The premises were purchased in 1904 by one Cooperstein, who remained in them as occupier until his death in 1924. The plaintiff then bought the premises and occupied them until some time in 1928, and, as the judge finds, the premises were, therefore, occupied by the owners from 1904 until 1928, when they were let for the first time. They were let to the defendant in 1937. The rateable value on Apr. 6, 1931, and apparently at all material times, was such as to bring the premises within the quantitative definition of the Rent and Mortgage Interest (Restrictions) Act, if they were otherwise within that Act for other reasons. The principal Act which deals with this matter is the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It is a consolidation of the earlier

Acts, which are in substance repealed. That Act contains in sect. 12 (2) a definition of a dwelling-house within the meaning of the Act:

> This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed (*a*) in the metropolitan police district, including therein the City of London, £105; (*b*) in Scotland, £90; and (*c*) elsewhere, £78; and every such house or part of A a house shall be deemed to be a dwelling-house to which this Act applies . . .

By a curious coincidence, the word "dwelling-house" is stated in sect. 16 (1) of the Act of 1933 to have the same meaning as in the principal Acts, and then follows a meaning which is different from that which is contained in the principal Acts:

> B . . . that is to say, a house let as a separate dwelling or a part of a house being a part so let.

A doubt was expressed in *Brooks* v. *Brimecome* (1) as to the effect of that definition in the 1933 Act on the earlier definition which I have cited in sect. 12 (2) of the Act of 1920, but, if the matter has now to be C considered, for myself, I am of the opinion that, having regard to that subsequent definition, and having regard, indeed, to the whole mischief to which the Acts are directed, sect. 12 (2) of the Act of 1920 should be read as if the word "let" governed the whole house as well as part of it. In these circumstances, it would appear that in 1920 the Act D would have applied to this house if it had been let. As we are told by the judge, in fact it was not let until 1928. If the matter had stood there, the proper view might well have been that, by reason of the fact that this house was not let until 1928, the Act of 1920 would not apply. There is an Act dealing with this matter in 1923, with which I shall E deal hereafter, but for the moment I wish to eliminate the consideration of that Act and deal with this matter as if there were nothing in the Act of 1923 which affected the position and to ask myself whether or not, if a house to which the Act applies so far as the rateable value in 1920 is concerned, was first let in 1928 at a rent which would bring it F within the Act of 1920, the Act of 1920 would apply to it. In my opinion, it would. I can find nothing in the Act of 1920 to limit the application of sect. 12 (2) to a house which was let as a separate dwelling at the time of the passing of the Act—namely, on July 2, 1920. There are no words of limitation to say that the subsection shall not apply to G a house which subsequently qualifies, and, when one contrasts the language of sect. 12 (2) of the Act of 1920 with that, for example, of sect. 2 (1) of the Act of 1923, or of sect. 2 of the Act of 1933, one's attention is immediately drawn to the fact that there is no limitation in that subsection of the Act of 1920 as there is in those provisions, as H to what shall happen at the time of the passing of the Act. Sect. 12 (2) of the Act of 1920 is quite silent as to that matter, and I can see no ground for the limitation of the application of sect. 12 (2) to any house which at any time, so long as that Act was in force and not amended, would fall within its provisions. Therefore, if there had been no further legislation after 1920, I should have come to the conclusion that in 1928, by reason of the fact that this house was then let, sect. 12 (2) would apply the Act of 1920 to the house, and that thereafter it would be a house to which the Act of 1920 applied.

The next matter which has to be considered is the effect of sect. 2 (1) of the Act of 1923. Of course, at that time, the house had not yet been let. That subsection provides as follows : A

> Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house . . .

B

In so far as the principal Act contemplates an Act applying to a dwelling-house which is let, it is clear that those words, read in their ordinary strict sense, give to the word "landlord" the meaning of one who is legally related to a tenant. If the "landlord" were in possession of the whole of the dwelling-house, normally he would not have a tenant, and C the result would be that the subsection really would be entirely inoperative. This problem, however, has been very fully considered by this court in a decision which has never since been questioned in its totality, although certain observations of the judges have been commented upon—namely, *Lloyd* v. *Cook* (2). The effect of that decision, D compendiously stated, is that the word "landlord" in sect. 2 (1) of the Act of 1923 does not necessarily imply the existence of a tenant, but that a freeholder who has never let a dwelling-house to a tenant may be a landlord within the meaning of the section. It is thus put by SCRUTTON, L.J., in the course of his judgment, at p. 120 : E

> The word "landlord" must be used either in the looser meaning of "owner," or in the still looser meaning of a person who at a later stage is going to appear as a landlord contesting with a tenant the terms of his tenancy.

The other Lords Justices speak to the like effect. If one applies that test to the present case, this landlord in 1923 was a person who thereafter—namely, in 1928—was contesting, and is now contesting in this F court, with a tenant the terms of the tenancy, and, therefore, is a landlord within the meaning of sect. 2 (1) of the Act of 1923. It follows, therefore, that he was a landlord of a dwelling-house to which the principal Act applied, and the provision is that it "shall cease to apply to the dwelling-house." G

Were matters to rest there, the landlord would be triumphant, but, unfortunately for him, the legislature has thought fit once more to interfere in this difficult matter. By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 4 (1), it is provided as follows :

> If the landlord of any dwelling-house let as a separate dwelling immediately H before the passing of this Act, being a dwelling-house of which the rateable value on the appointed day did not exceed the respective amount mentioned in sect. 2 of this Act, [the amount in the metropolitan police district is £35 rateable value on the appointed day, and the rateable value here did not exceed that amount] claims that by virtue of the provisions of sect. 2 of the Act of 1923 the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall within 3 months after the passing of this Act make to the council of the county borough

> or county district in which the dwelling-house is situated application in the prescribed form for the registration of the dwelling-house . . .

In point of fact, he has made no such application, and there is a proviso in sect. 4 (2) of the same Act in the following terms:

> . . . if, on application to the county court of the district in which the house is situated, the court not later than one year from the passing of this Act [May 26, 1938] certifies that there was reasonable excuse for the failure to make application for the registration of the dwelling-house within the time aforesaid and application for registration is made within 7 days after the certificate has been granted, then, if the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, sect. 2 of the Act of 1923 shall, notwithstanding anything in the last preceding section, apply to the dwelling-house as if the references in the said sect. 2 to the passing of that Act were references to the date on which the application for registration is made.

If this landlord could have brought himself within that proviso or within sect. 4, he being, as I have held, within sect. 2 (1) of the Act of 1923, he might conceivably still have availed himself of that section, and have satisfied the county court judge that his house was not a controlled house. Counsel for the respondent wishes, notwithstanding the effluxion of time, to have an opportunity of arguing that he falls within the proviso to sect. 4 (2) of the Act of 1938, which I have just read, and, in so far as I am of opinion that there must be a new trial in this case to determine, among other things, if this house is controlled, whether or not the standard rent has been paid, and what the effect of excess payment may be upon the counterclaim, I think that that point should be reserved to him also. As the case now stands, however, I am of opinion that he brings himself within sect. 2 (1) of the 1923 Act as being a landlord to whom the principal Act applies, and has failed to bring himself within the saving clauses of the Act of 1938, and that the judge was wrong in coming to the conclusion that, under the principal Act of 1920, this house was not a controlled house. It follows, therefore, the house being a controlled house, and sect. 2 (1) of the Act of 1923 applying to it, that the landlord may be able to say that the principal Act had ceased to apply to the dwelling-house in 1923 if he can avoid the consequences of the provisions of the Act of 1938, to which I have referred. Whether or not he can do so is a matter still to be determined. I am of opinion that there must be a new trial in this case, that this appeal succeeds, and that it should be allowed with costs. We will leave the costs of the first hearing to the discretion of the judge when he rehears this case, but the costs of this appeal must be the appellant's.

LUXMOORE, L.J.: I agree.

ATKINSON, J.: I agree. I add only one sentence, and that is that the interpretation which we have put upon sect. 12 (2) of the Act of 1920 is implicit, I think, in the decision of *Goudge* v. *Broughton* (2).

Appeal allowed with costs. New trial ordered.

Solicitors: *S. Seifert* (for the appellant); *T. V. Edwards* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

MACKAY AND OTHERS *v.* FORBES.

[Privy Council (Lord Thankerton, Sir George Rankin and Sir Philip MacDonell), **October 24, 26, November 10, 1939.**]

Privy Council—India—Jurisdiction—Appeals from High Court of India—Case involving interpretation of Government of India Act, 1935, *or order made thereunder—Certificate that case involves such interpretation—Question not considered by High Court—Government of India Act,* 1935 (c. 42), *ss.* 205, 293—*Government of India* (*Adaptation of Indian Laws*) *Order,* 1937 (*S.R. & O.,* 1937, *No.* 269).

The respondent in this appeal took the preliminary point that the case involved a substantial question of law as to the interpretation of an order in council—namely, the Government of India (Adaptation of Indian Laws) Order in Council, 1937—made under the Government of India Act, 1935, and that accordingly the High Court in India should have certified it as such, and that the appeal should have been to the Federal Court in India, and not to the Privy Council. By the Government of India Act, 1935, s. 205, the High Court should certify in each case whether any such question of interpretation arises, but in this case there was no record that the matter was ever considered by the High Court Bench. In fact, the High Court in its original jurisdiction had disposed of the case without reference to that order in council, but on appeal much of the original judgment was reversed on the authority of the order:—

Held: in the absence of any record that the certificate was withheld, the Privy Council had no jurisdiction to hear the appeal, but, if thereafter the High Court made an order withholding the certificate, the appeal would be restored.

[EDITORIAL NOTE. The High Court in India in a matter involving the construction of the Government of India Act, 1935, or any order made thereunder, has imposed upon it a duty to grant or withhold a certificate that such construction came in question. The court has to fulfil this duty of its own motion, whether or not the parties bring the question to its notice. Before an appeal can be brought in any such case, the matter must be considered by the High Court and a certificate granted or withheld.

As to Appeals from India, see HALSBURY, Hailsham Edn., Vol. 11, pp. 221, 222, paras. 425-428; and for Cases, see DIGEST, Vol. 17, pp. 499-501, Nos. 630-653.]

Appeal from a judgment and order of the High Court of Judicature at Fort William in Bengal, in its civil appellate jurisdiction, dated Apr. 11, 1938, allowing in part the appeal of the respondent from the judgment and order of Panckridge, J., dated July 22, 1937. The facts are fully set out in the judgment of their Lordships delivered by Lord Thankerton.

L. P. E. Pugh, K.C., and *W. W. K. Page* for the appellants.

J. Nissim for the respondent.

Lord Thankerton: The respondent in this case raises a preliminary point as to the jurisdiction of this Board to entertain this appeal in view of the provisions of the Government of India Act, 1935, s. 205, which provides as follows:

(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any

> order in council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.
>
> (2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, A with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.

This section imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order, the giving or withholding of the certificate. On such determination the B jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate, should be recorded, not only for the information of the parties, but also—a matter of equal importance—for the certification of this Board and the Federal Court as to C their jurisdiction to entertain an appeal. No such record appears in the present case, nor is there anything to suggest that the matter was considered by the High Court Bench which delivered the judgment and order of Apr. 11, 1938. The same is true of the High Court Bench which certified this case as a fit one for appeal to His Majesty in Council D on June 15, 1938, and which was differently constituted. However, as their Lordships have already indicated, the statutory duty fell to be discharged by the Bench which delivered the judgment and order of Apr. 11, 1938.

In the present suit, the appellants seek an order for appointment of E the Official Trustee of Bengal to be trustee of the estate of one Alexander John Forbes, deceased, under the provisions of the Official Trustees Act, 1913 (Act II of 1913), s. 10, or, alternatively, for appointment of the said Official Trustee under the Indian Trustees Act, 1866, s. 35. The estate of the deceased consisted partly of immovable property situate F outside the Division of Bengal.

The Official Trustees Act, 1913, was amended by the Government of India (Adaptation of Indian Laws) Order, 1937, which was made by virtue of the Government of India Act, 1935, s. 293, and came into force on Apr. 1, 1937. The present writ of summons was taken out on G May 5, 1937. PANCKRIDGE, J., who made the order of July 22, 1937, did not consider the order in council of 1937, but it was fully considered by the Appellate Bench (COSTELLO and LORT-WILLIAMS, JJ.), and it will be sufficient to quote some short passages from their judgment :

> We are quite satisfied that, had the attention of the judge been drawn to the alteration effected by means of the order in council, his decision would in all H probability have been otherwise than what it was. . . . The question whether the court can appoint the Official Trustee of Bengal as trustee over properties outside the province seems to depend upon the provisions of sect. 3, as amended by the order in council and the Official Trustees Act, 1913, s. 10. . . . In other words, we think that, under the provisions of the Act as it now stands, this court is not entitled to stretch its arms, if I may use the expression, beyond the territorial limits of its jurisdiction. The result is that we think that the order made by PANCKRIDGE, J., cannot stand in so far as it relates to any property not lying or not situate within the territorial jurisdiction of the court. Mr. Banerji sought

to argue that there is ample power in the court under the general provisions of the Indian Trustees Act. I do not think it necessary to consider that aspect of the matter. This petition was essentially and primarily concerned with the appointment of the Official Trustee as such, and the matter is one which quite clearly falls to be decided under the provisions of the Official Trustees Act, and that Act alone.

The Government of India Act, 1935, s. 205, is not referred to in the judgment. Counsel for the appellants suggests that the court may have considered this section and decided to withhold a certificate, though that decision is not expressed. The passages quoted above make this unlikely, and, in the absence of a certificate, their Lordships think that the appeal should be dismissed with costs. If, however, the High Court should hereafter make an order withholding a certificate under sect. 205, the appellants are to be at liberty to apply to His Majesty in Council to have the present appeal restored. Their Lordships will humbly advise His Majesty accordingly. With reference to the costs of a petition by the respondent, which, by the Board's order of May 18, 1939, were directed to be paid by him in any event, these will be taxed and set off against the costs that the appellants are by this judgment ordered to pay.

Appeal dismissed with costs, but with liberty for the appellants to apply to have the appeal restored if they obtain an order from the High Court withholding a certificate under the Government of India Act, 1935, *s.* 205.

Solicitors: *Morgan, Price, Marley & Rugg* (for the appellants); *Ashurst, Morris, Crisp & Co.* (for the respondent).

[*Reported by* Charles Shelley, Esq., *Barrister-at-Law.*]

COCKWELL AND ANOTHER *v.* ROMFORD SANITARY STEAM LAUNDRY, LTD.

[Court of Appeal (Slesser and Luxmoore, L.JJ., and Atkinson, J.), **November 1, 2, 22, 1939.**]

Landlord and Tenant—Option to purchase—Interest on purchase money to be payable on expiration of notice—Lease then determined—Liability of original lessees for rent.

On Mar. 8, 1929, C., whose executors were the plaintiffs in this action, granted a lease of premises to the defendants, and included in the lease an option for the lessees to purchase the freehold of the premises. By the terms of the option clause, the lessees were at any time before June 24, 1938, to give the lessor 6 calendar months' previous notice in writing of their desire to purchase, and the lessor was, upon the expiration of such notice, and upon payment of £2,000, together with interest at 5 per cent. per annum from the expiration of such notice until the completion of the purchase, and of all rent reserved up to such completion, to convey the freehold of the premises to the lessees. The lease was originally granted to the defendants, but they assigned the lease on Feb. 15, 1932. On June 22, 1938, the assignees duly gave notice to exercise the option. The assignees paid the rent due in June and Sept., 1938, but, falling into financial difficulties, they did not pay that due in Dec., 1938, discontinued the purchase of the property, and stated that they desired to give up possession.

The plaintiffs then claimed from the defendants as original lessees the rent due on Dec. 25, 1938, and rent subsequently falling due. The defendants contended that, the option having been exercised by the assignees, the relationship of landlord and tenant ceased on Dec. 25, 1938, and was replaced by that of vendor and purchaser, and that, therefore, there could be no liability for rent after Dec. 25, 1938:—

A HELD: provision for the payment of interest on the purchase money showed that the relationship of landlord and tenant was to cease on the expiration of the notice exercising the option. The lease was determined on Dec. 25, 1938, and the defendants were not liable for rent after that date.

[**EDITORIAL NOTE.** It is well known that the drafting of a clause in a lease B giving an option to purchase the demised premises is a matter full of difficulties, but the particular difficulty which has arisen in this case is not one against which provision is usually made. It seems that this position may be avoided by providing that nothing shall operate to determine the lease and the liability thereunder until the purchase price payable under the option has been actually paid.

AS TO EFFECT OF EXERCISE OF OPTION TO PURCHASE, see HALSBURY, Hailsham C Edn., Vol. 20, pp. 67, 68, para. 72; and FOR CASES, see DIGEST, Vol. 30, pp. 473-475, Nos. 1363-1375.]

Cases referred to:

(1) *Weston* v. *Collins* (1865), 5 New Rep. 345; 30 Digest 475, *1378*; 34 L.J.Ch. 353; 12 L.T. 4.

(2) *Mills* v. *Haywood* (1877), 6 Ch.D. 196; 30 Digest 477, *1391.*

D (3) *Doe d. Gray* v. *Stanion* (1836), 1 M. & W. 695; 40 Digest 137, *1078*; 5 L.J.Ex. 253.

(4) *Raffety* v. *Schofield*, [1897] 1 Ch. 937; 30 Digest 474, *1372*; 66 L.J.Ch. 448; 76 L.T. 648.

APPEAL by the defendants from an order of His Honour JUDGE THOMAS E in the Mayor's and City of London Court, dated July 12, 1939. The facts are fully set out in the judgment of the court delivered by LUXMOORE, L.J.

Arthur H. Forbes and *W. Longley James* for the appellants.

Robert Fortune for the respondents.

F

LUXMOORE, L.J. [delivering the judgment of the court]: On Apr. 6, 1939, the plaintiffs, as executors of one Annie Elizabeth Cockwell, issued a writ in the King's Bench Division against the Romford Sanitary Steam Laundry, Ltd., claiming payment of the sum of £60 in respect of two G quarters' rent due respectively on Dec. 25, 1938, and Mar. 25, 1939, under a lease, dated Mar. 8, 1929, and made between Annie Elizabeth Cockwell as lessor and the laundry company as lessees, of No. 203, High Street, Hornchurch. The action was remitted to the City of London Court. The laundry company admitted liability in respect of the H quarter's rent due on Dec. 25, 1938, and paid into court the sum of £30 in respect of it, but denied liability in respect of the rent due on Mar. 25, 1939. On July 12, 1939, His Honour JUDGE THOMAS gave judgment for the plaintiffs for £60, and the costs of the action to be taxed on the county court Scale C down to the payment into court, and on Scale B thereafter, and, after stating that £30 had been paid, ordered the laundry company to pay the remaining £30 and the beforementioned costs. The laundry company appeal from this order so far as the claim for the £30 is concerned.

There is no dispute of fact. The question whether or not the laundry company are liable in respect of the £30 is a question of law. The laundry company claim that, on the true construction of the material A documents, and on the admitted facts, all liability to pay rent in respect of the demised premises ceased on Dec. 25, 1938. The lease of Mar. 8, 1929, to the laundry company contained in cl. 5 a provision in these terms:

> Provided always and it is hereby agreed that if the lessees shall at any time B before June 24, 1938, give to the lessor or leave at her last known place of abode in England 6 calendar months' previous notice in writing of the desire of the lessees to purchase the fee simple of the said premises then the lessor shall upon the expiration of such notice and upon payment of the sum of £2,000 together with interest at the rate of 5 per cent. per annum from the expiration of such notice until the completion of the purchase and of all rent hereby reserved up to such expiration assure the said premises unto the lessees for an estate in fee simple C free from incumbrances.

The lease contains a definition clause, whereby the lessor is defined as including the estate owner or estate owners for the time being of the reversion of the demised premises expectant on the term thereby granted, and all other persons for the time being entitled to receive and enforce D payment of the rent thereby reserved, while the lessees are defined as including the laundry company, their successors and assigns, and all other persons deriving title under the lessee. The lease is for a term of 14 years from Dec. 25, 1928, and the rent reserved is £120 per annum, payable by equal quarterly payments on the usual quarter days. E

On Feb. 15, 1932, the laundry company executed an assignment of the lease in favour of three persons, Charles Robb Jay, Albert Henry Deverell and George Macdonald Allan. This document contains an express assignment in favour of the assignees of the benefit of the option to purchase the demised premises contained in the lease. On June 22, F 1938, some 6 months before the expiration of the option, the assignees gave notice to the plaintiffs, as executors of the lessor, in the following terms:

> We hereby give you notice that we wish to exercise the option as contained in cl. 5 of the lease to purchase the freehold of No. 203, High Street, Hornchurch, for the sum of £2,000 sterling. G

After giving this notice, the assignees duly paid the rent falling due under the lease on June 25 and Sept. 29, 1938, but they failed to pay the rent falling due on Dec. 25, 1938.

On Dec. 2, 1938, the plaintiffs' solicitors, Messrs. Hogan & Hughes, sent to Messrs. Mullis & Peake, the solicitors for the assignees, the abstract H of title to the demised premises. On Dec. 14, 1938, Messrs. Mullis & Peake wrote to Messrs. Hogan & Hughes informing them that, since their clients had exercised their option to purchase the demised premises, they had called a meeting of their creditors, and that they were doubtful if their clients would be able to proceed with the matter.

On Jan. 3, 1939, Messrs. Mullis & Peake again wrote to the plaintiffs' solicitors, and stated that it was impossible for their clients to proceed with the purchase. The plaintiffs' solicitors replied on Jan. 4, and stated, among other things, that they would not advise their clients (that is, the plaintiffs) to release the assignees from their obligation to purchase. To this letter the assignees replied that, if the plaintiffs took proceedings to enforce the contract, such proceedings would not be defended. On Jan. 10, 1939, the plaintiffs' solicitors wrote to the laundry company as the original lessees in the following terms:

> *Re* 203, High Street, Hornchurch.
>
> We think it right that, as your company was the original lessee of the above property under a lease granted by Mrs. Annie Elizabeth Cockwell on Mar. 8, 1929, you should be informed of the present position as it affects this property. You are, of course, aware that the lease was assigned to Messrs. Jay and Deverell. That firm in June last exercised the option conferred by cl. 5 of the lease to purchase the freehold of the property for the sum of £2,000, and the sale should have been completed by the 25th ultimo. We are now, however, informed by Messrs. Jay & Deverell's solicitors that they are unable to complete this purchase, and that they desire to give up occupation of the premises. The quarter's rent due on the 25th ultimo has not been paid, and although this is more than covered by the existing liability for Sched. A tax, no receipt for the tax has yet been produced. We have, of course, advised our clients, Miss Cockwell and Mr. J. Cockwell, the present owners of the freehold interest, that the liability of your company for the rent and for performance of the covenants contained in the lease continues, and our clients feel, therefore, that you should know of the present position, and of the request which has been made by Messrs. Jay and Deverell to be allowed to give up occupation of the property. Our clients are having the property inspected with a view to ascertaining its present condition, and if the necessity arises a claim will also be made under the repairing covenants of the lease.

There was further correspondence, but there was no final determination on the part of the plaintiffs to accept the assignees' conduct as a repudiation of the contract, and no steps were taken to obtain its rescission, either with or without the consent of the laundry company or by the court. As already stated, the plaintiffs issued the writ against the laundry company on Apr. 6, 1939, claiming the rent due on Mar. 25, 1939, as well as on Dec. 25, 1938.

The laundry company contend that they are under no liability in respect of rent after Dec. 25, 1938, because, on the true construction of cl. 5 of the lease, on the expiration of 6 calendar months after the giving of the notice thereunder, the relationship between the plaintiffs and the assignees changed from that of lessors and lessees and became that of vendors and purchasers, and that, by reason of such change, the term granted by the lease terminated either upon the express terms of cl. 5, or, alternatively, by operation of law.

The plaintiffs denied that this was the proper construction of the lease, or that there was any determination of the tenancy by operation of law. They contended that, upon the true construction of the clause in question, there was no contract for sale and purchase unless and until the sum of £2,000, with interest thereon from Dec. 25, 1938, down to the date of payment, together with all rent due up to and including Dec. 25, 1938, was in fact paid by the assignees to the plaintiffs. They further alleged that, if, contrary to their contention, a contract for sale and purchase came into existence on the giving of the notice to exercise the option, then the effect of such contract was not to determine the term granted by the lease on the expiration of 6 months from the date of the notice, but to suspend its operation pending the completion of the purchase so long as the contract remained in force, and that, at any rate before Mar. 25, 1939, the contract ceased to be effective, and the A term granted by the lease and the liability for the rent under the covenants contained in the lease revived, so that the lease remained in full force and effect, and the liability of the laundry company as original lessees and of the assignees respectively thereunder remained unimpaired, and still continued. The judge appears to have accepted B both branches of the plaintiffs' contention.

The first matter to be considered is the true construction of cl. 5 of the lease. Is it a condition precedent to the constitution of any contract for sale and purchase between the plaintiffs and the assignees that the purchase price should be paid? The salient feature in the clause C appears to be that, in the event of a notice of the desire of the assignees to purchase being given, the rent reserved by the lease is to cease on the expiration of 6 months' notice from the date of the notice, and, in lieu of the liability to pay rent, a new and different liability is to come into existence—namely, the liability to pay interest at 5 per cent. per annum D on the fixed purchase price of £2,000. Further, it is to be observed that no actual date is fixed for completion. It is plain that the expiration of the 6 months from the date of the notice is not the date for completion of the purchase, because it is from that date that interest on the purchase price begins to run and continues so to do until the actual completion E takes place. The obligation to assure the premises arises under the contract, but, of course, the assignees cannot call for any assurance until the purchase price is paid, together with the appropriate sum for interest and all rent up to and including the expiration of the notice. It is, we think, reasonably plain that, if for any reason the purchase should not F be completed until, say, after Mar. 25, 1939, or any subsequent date, no liability to pay rent can arise, because a different obligation—namely, an obligation to pay interest on the purchase price—is substituted for the rent.

It is contended on behalf of the plaintiffs that the construction of G this clause was governed by the decision in *Weston* v. *Collins* (1). In that case, a lease was granted by one Collins to two lessees for a term of years. The lease contained a covenant that, if the lessees

> . . . their executors administrators or assigns shall be desirous at the expiration of the said term of purchasing the inheritance in fee simple of and in such portion H of the said messuage or tenement hereditaments and premises as is freehold and the copyhold inheritance subject to a stinted fine . . . and shall give unto or leave at the last known or most usual place of abode of the said James Collins his heirs or assigns in England 6 calendar months' notice in writing of such his or their desire and shall pay unto the said James Collins his heirs or assigns the sum of £2,000 sterling as and for the purchase thereof and also all arrears of the rent hereinbefore reserved he the said James Collins his heirs or assigns will at the expense [of the lessees] their executors administrators and assigns sell convey

> and surrender the said messuage or dwelling-house buildings and premises to the said [lessees] in fee simple as to the freehold part and the customary inheritance of the copyhold part subject as aforesaid free from incumbrances.

The covenant contained provisions imposing on the lessees the liability of paying for the preparation of the abstract, and other matters in connection with the making out of a good title to the lessees' satisfaction, and the assurance of the property to the lessees. It was also expressly provided that the lessees accepted and approved Collins' title. LORD WESTBURY held that there was no contract between the parties unless and until the purchase price was paid, and, in view of the actual words of the covenant, it is difficult to appreciate how he could have arrived at any other conclusion, for the covenant states in plain terms that it is upon payment of the purchase price that the lessor is to sell, a form of words which is totally different from the form of words used in the present case.

In our judgment, the words of cl. 5 of the lease in the present case are, for all practical purposes, indistinguishable from those considered in *Mills* v. *Haywood* (2). In that case, a lease granted to the plaintiff Mills contained a clause in the following terms, at p. 197:

> Mr. Mills to have the option at any time during the said term to purchase the above premises for £3,500 and such an amount as Mr. Austin shall pay for law and other expenses attendant upon the purchase and re-sale thereof; and upon payment thereof and of the other sums due under this agreement as hereinafter mentioned to Mr. Austin the said term of 10 years and the said rent of £1,000 per annum shall thereupon cease and the said Mr. Mills shall thereupon be entitled to an assignment of the leases.

It was held by the Court of Appeal, affirming the decision of HALL, V.-C., on this point, that the giving of a notice under the option constituted a binding contract between Mills and the assignee of the reversion, and that the payment of the purchase price was not a condition precedent to the coming into existence of such a contract. We have no hesitation in holding that, on the true construction of cl. 5 of the lease, a binding contract to purchase came into existence when the notice exercising it was given to the plaintiffs.

Counsel for the plaintiffs submitted that, even if a binding contract came into existence on the giving of the notice, the existence of such a contract could not operate as a surrender of the tenancy created by the lease of Mar. 8, 1929, by operation of law, and he relied upon the decision in *Doe d. Gray* v. *Stanion* (3). The facts of that case are distinguishable from those of the present case. There the defendant Stanion occupied premises as a tenant from year to year of the landlord Gray. While the tenancy was still subsisting, Stanion entered into a separate agreement with Gray to purchase the property the subject of the tenancy agreement. The agreement for purchase not having been carried into effect, Gray demanded possession of the property. Stanion refused to give up possession, and Gray brought an action of ejectment against Stanion. Stanion alleged that he was tenant from year to year, and that, as notice to determine that tenancy had not been given, he could not be ejected. The landlord contended that the agreement for purchase operated at law as a surrender of the tenancy. The Court of Exchequer Chamber held that the tenancy was not determined by operation of law, because it was an implied term of the agreement for purchase that the landlord should make out a good title. **Parke**, B., who gave the judgment of the court, said, at pp. 700, 701 :

> On the argument on showing cause against the rule *nisi* for a new trial, it was insisted on the part of the plaintiff, that a notice to quit was unnecessary ; and that on two grounds : first, that by the agreement of Sept. 2, 1831, a new tenancy at will was created, which put an end to the tenancy from year to year, and that such tenancy at will was determined by a simple demand of possession from the tenant ; secondly, that if the tenancy from year to year was not so determined, the defendant's declaration on Oct. 2, to the agent of the lessor amounted to a disclaimer. We are of opinion that neither of these reasons is sufficient to dispense with the usual notice to quit. As to the first, there is no doubt but that if there be an agreement to purchase, and the intended purchaser is thereupon let into possession, such possession is lawful, and amounts at law, strictly speaking, to a bare tenancy at will. . . . It is not, however, the agreement, but the letting into possession, that creates such tenancy : for the person suffered so to occupy cannot, on the one hand, be considered as a trespasser when he enters, and, on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law. But where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. In this case, if the true construction of the agreement be that, from the date of it (or any other certain time), the defendant was to be absolutely a debtor for the purchase money, paying interest on it, and to cease to pay rent as tenant from year to year, a tenancy at will would probably be created after that time ; and the acceptance of such new demise at will would then operate as a surrender of the interest from year to year, by operation of law. But if the agreement is conditional to purchase only provided a good title should be made out, and to pay the purchase money when that should have been done, and the estate conveyed, there is no room for implying any agreement to hold as tenant at will in the mean time ; the effect of which would be absolutely to surrender the existing term, whilst it would be uncertain whether the purchase would be completed or not.

We think that the passage just read applies to cl. 5 of the lease. If that clause is considered carefully, it becomes reasonably clear that, on the expiration of the 6 months after the date of the notice of his desire to purchase, it is provided that the person exercising the option is to become a debtor for the purchase money, and is from that date to pay interest on it instead of paying any rent as tenant under the lease. In other words, the clause provides that the relationship between the parties is to be changed from that of lessor and lessee to that of vendor and purchaser, the possession of the person exercising the option being, therefore, no longer attributable to the lease, but to the last-mentioned relationship. We think that it would be incorrect to say that the tenancy was surrendered by operation of law, for it was terminated under the express provision of the clause.

In our judgment, the judge was in error in holding, as a matter of construction, that the lease remained in full force, notwithstanding the coming into existence of the contract to purchase. This conclusion disposes of the case, but it is necessary to deal with the alternative argument of counsel for the respondents—namely, that, pending the completion of the contract, the lease remained in suspense. Counsel

for the respondents based this argument upon the decision of ROMER, J., in *Raffety* v. *Schofield* (4). In that case, Schofield had entered into an agreement with Raffety to erect certain buildings on the plaintiff's land on the terms that, when the buildings were erected, Schofield was to have a lease of the land and buildings erected thereon for 99 years.
A The agreement contained an option to Schofield to purchase the freehold. Schofield gave notice of his intention to exercise the option, but did not complete, or proceed with, the erection of the buildings in accordance with the terms of the building agreement. Raffety gave Schofield notice to determine the building agreement, and demanded possession of the
B property. On Schofield's refusal to give up possession, Raffety brought his action for possession. It was held that, in the particular circumstances of that case, the plaintiff could not recover possession, because the contract for sale resulting from the notice to exercise the option was still subsisting. ROMER, J., discussed the rights and position
C of Schofield in the interval between the date of the contract for purchase and its completion, and said, at p. 942:

> . . . I agree . . . that that contract did not in itself before completion put an end to what I may call the leasing parts of the building agreement . . . of course the contract of purchase might not be completed, and that from no fault of the purchaser; for it might (by way of example) be put an end to by the vendor under
> D the provision of cl. 17 that if the purchaser made any requisition that the vendor was unable or unwilling to remove or comply with the latter might rescind the sale; and it could not be within the contemplation of the building agreement that in such a case the purchaser should not only lose his purchase bargain, but also find himself deprived of all his rights under the other parts of the agreement.

It is to be observed that, at the date when the option was exercised,
E there was no lease in existence, the relationship between Raffety and Schofield under the building agreement being that Schofield was a tenant at will, and obviously the exercise of the option could not operate as a surrender of the right to a lease under the building agreement if the vendor was unable to make a title. That case can be no authority that,
F in the present case, the tenancy is to remain in existence but is to be treated as suspended, for, as has already been stated, on the true construction of cl. 5, the parties agreed that the lease must be determined on the expiration of the 6 months from the exercise of the option.

In the result, we hold that the judge was in error in holding that any
G rent accrued due under the lease after Dec. 25, 1938, and in ordering the laundry company to pay to the plaintiffs the sum of £30. This appeal must, therefore, be allowed. The order of the judge must be varied by striking out the order on the laundry company to pay to the plaintiffs the sum of £30. The direction that the laundry company are to pay
H the plaintiffs' costs up to and including the date of payment into court will stand, except that those costs should be taxed on the B Scale and not on the C Scale. The order that the laundry company are to pay the costs from the date of the payment into court of the £30 will also be struck out, and the plaintiffs will be ordered to pay the costs of the laundry company from that date, such costs to be taxed on the B Scale.

The plaintiffs must pay the laundry company's costs of this appeal. There will be the usual provision as to set off.

Solicitors: *Forbes & Son* (for the appellants); *Hogan & Hughes* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

REEVES *v.* REEVES.

[Probate, Divorce and Admiralty Division (Bucknill, J.), **November 15, 1939.**]

Divorce—Petition by wife—Decree nisi—Subsequent adultery—Intervention by King's Proctor—Conduct of petitioner—Principles to be applied.

The petitioner obtained a decree *nisi* on the ground of the adultery of her husband, who had left her to live with another woman. At the time the decree *nisi* was made, the petitioner was an innocent woman, but, subsequent thereto, she committed several acts of adultery, and on this ground the King's Proctor intervened, asking that the decree *nisi* in her favour should not be made absolute:—

Held: (i) the object of the 6-months' interval between the decree *nisi* and the decree absolute is to enable the King's Proctor to make inquiries as to the *bona fides* of the petitioner's case. It is not intended as a test of the morality of the petitioner.

(ii) public morality required that this particular marriage should be dissolved. The decree would, therefore, stand, but the intervention would be allowed.

[**EDITORIAL NOTE.** As the marriage is not dissolved until the decree is made absolute, it follows that misconduct after the pronouncement of the decree *nisi* and before it is made absolute is adultery during the marriage. It is held, however, that such adultery will not necessarily prevent the decree being made absolute, the test to be applied as to the effect of such adultery being similar to that by which the court exercises its discretion in the case of adultery by a petitioner before the decree *nisi.*

As to Adultery Between Decree *Nisi* and Decree Absolute, see HALSBURY, Hailsham Edn., Vol. 10, p. 690, para. 1025; and for Cases, see DIGEST, Vol. 27, p. 481, Nos. 5097, 5098.]

Case referred to:

(1) *Apted* v. *Apted & Bliss*, [1930] P. 246; Digest Supp.; 99 L.J.P. 73; 143 L.T. 353.

Intervention by the King's Proctor showing cause why a decree *nisi* granted in favour of the petitioner should not be made absolute, on the ground that, since the decree, the petitioner had admittedly committed adultery on three occasions with one Harden Jones.

E. Holroyd Pearce for the King's Proctor.

S. E. Karminski for the petitioner.

Sir George W. H. Jones for the respondent.

Bucknill, J.: It does not seem to me that, in deciding this question, I must approach the matter from the point of view that this

period of 6 months between the decree *nisi* and the decree absolute is in any way intended as a test of morality for the petitioner, or that it is right to impose a test of that kind. I think that the object of the 6-months' interval is to enable the King's Proctor to make inquiries as to the *bona fides* of the petitioner's case. It sometimes works great
A hardship, this 6-months' interval. One sometimes gets cases where a wife has been deserted by her husband 20 years ago, and has been left without any means, so that she has been almost compelled to live with another man, to all intents and purposes as his wife, has children by him, and then gets a decree *nisi* and is placed in the very difficult position
B that, if she leaves the man, she has no means whatever of living or of supporting her children. If the test to be applied were a test of morality, and one ought to refuse a decree in such a case because the woman, in those circumstances, continued to live with the man, it would, I think, be doing an intolerable injustice. I am sure that that is not the principle
C which I have to apply.

It is very much in favour of the petitioner that she came into court in the first instance as an innocent person. She was married to her husband in 1926, when she was 21 years old, and in 1935 her husband left her to live with another woman, and, as I understand, continued
D to live with that woman up to the date of the hearing of the petition, so that the petitioner kept nothing back from the court. She has, on the other hand, committed adultery as a married woman—there is no doubt about that—during this interval between the decree *nisi* and a decree absolute.

E What are the facts which are material to this case? I must approach this case, I think, very much on the lines laid down by LORD MERRIVALE, P., in *Apted* v. *Apted & Bliss* (1), and I must approach it as a case much less difficult than it would have been if what happened in August and September, 1938, had happened before the decree *nisi* was
F granted. There are no children of the marriage, to start with. There is no hope of a reconciliation between husband and wife. I think to some extent Mrs. Reeves was tricked by this man, who was a good deal older than herself, and who posed as a widower when in fact he was married, and cajoled her, I think, into living with him by a promise of marriage
G when she had got her decree. She had no means of her own. She was living entirely on an allowance from her husband, and I do not blame her for looking to the future and to the possibility of obtaining another husband. Unfortunately, she did one extremely foolish and extremely wrong thing. She gave a false reference, which has had the result that
H an honest landlady has been defrauded of her rent. I think that she may have come to that to some extent under the influence of this man, and I hope very much that she will very seriously consider, in order to clear her good name, that her duty, her strong duty, lies in seeing that that money is paid back. However, I am not trying that issue. It has nothing to do with me here. It only throws some light upon her general

credibility. She seems to be a rather foolish person, rather foolishly clever, which is perhaps one of the most dangerous kinds of folly there is. I think, on the whole, however, that public morality requires this marriage to be dissolved. I see no useful purpose in its going on any longer than is absolutely necessary. That being so, I shall allow the intervention but let the decree stand. A

Solicitors: *The King's Proctor*; *Bower, Cotton & Bower* (for the petitioner); *Clifford Baron & Co.* (for the respondent).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

B

BARROWFORD HOLDINGS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

C

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **October 30, 1939.]**

The court dismissed an appeal by Barrowford Holdings, Ltd., from the decision of Lawrence, J., dated May 25, 1939, and reported [1939] 3 All E.R. 319. The Lords Justices merely stated that they entirely agreed with the judgment of Lawrence, J., and with the reasons given by him. D

SMITH *v.* CAMMELL LAIRD & CO., LTD.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Russell of Killowen, Lord Wright and Lord Porter), **October 13, 16, 17, 18, December 4, 1939.**]

A *Factories and Workshops—Shipbuilding yard—Vessel under construction—Defective staging—Occupier—Occupation of part of a vessel—Factory and Workshop Act*, 1901 (*c.* 22), *ss.* 79, 82, 104, 140, 141, 142, 149, 151—*Shipbuilding Regulations*, 1931 (*S.R. & O.*, 1931, *No.* 133), *regs.* 11, 13.

The defendants were the owners of a shipbuilding yard, in which there was a ship which they had built but not completed. In the ship B they had built a staging, which they permitted the C. I. Co. to use in order to do certain work for the future owners of the vessel. Owing to a defect in the staging, the plaintiff fell, and sustained serious injuries. The plaintiff contended that, by virtue of the Factory and Workshop Act, 1901, and the Shipbuilding Regulations, 1931, the defendants were under a statutory duty, as occupiers of the shipbuilding yard, to make C the staging safe. The defendants maintained that the occupier at the material time was not themselves but the C. I. Co. :—

HELD : (i) although the C. I. Co. occupied the staging in the lower part of a hold, the defendants were the "occupiers" within the meaning of the Shipbuilding Regulations, because they occupied the hold, the ship as a whole, the dock in which the ship was lying, and the shipbuilding yard of which the dock was part. The plaintiff, therefore, D had a cause of action against the defendants.

(ii) the present case did not fall within the Factory and Workshop Act, 1901, s. 104, which has no reference to the Shipbuilding Regulations, 1931, or to the issues in this case, nor have those regulations any application to the notional factories constituted under that section.

(iii) the duty imposed by the regulations was an absolute one and not one to take reasonable care to maintain the staging or to maintain E it only while the occupiers are themselves using it.

Order of Court of Appeal ([1938] 3 All E.R. 52) *reversed.*

[EDITORIAL NOTE. The operations of building ships and constructing or repairing works or factories necessarily involve the employment of a large number of contractors, each of whom will be engaged upon the construction or installation of some particular part of the completed whole. Each contractor requires for his own F purposes certain staging, scaffolding or works of that kind for the use of the men engaged on his job. In many cases, the regulations impose upon the "occupier" of such staging, etc., a statutory duty to see that it is in such a fit and proper state that the workmen will not be in danger of injury, and it therefore becomes necessary to define the meaning to be attached to the word "occupier" as used in such regulations. The Court of Appeal, by a majority, decided that the con-G tractor responsible for the particular job for which the staging was at the time being used was the "occupier" of the staging. In a dissenting judgment in the Court of Appeal, SLESSER, L.J., expressed the view that, in regulations made under the Factory and Workshop Act, 1901, ss. 79, 82, the term "occupier" must relate to the occupier of the whole factory, and not to the occupier of a part thereof. This view has been adopted by the House of Lords, except that VISCOUNT MAUGHAM, H without actually dissenting, favours the conclusion of GREER and CLAUSON, L.JJ., upon the main point discussed in the appeal. There is a subsidiary point discussed in nearly all the judgments—namely, that the duty imposed by the statutory regulations is an absolute duty. What is meant by this term absolute duty is explained by LORD WRIGHT in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R., at p. 739. The duty is not so absolute as to shut out the defence of contributory negligence, yet it would appear from the present case to limit the defence that the accident was due to the intervening act of a third party.

As to "Occupier," see HALSBURY, Hailsham Edn., Vol. 14, pp. 619-621, para. 1174; and for Cases, see DIGEST, Vol. 24, pp. 916-918, Nos. 117-126.]

Cases referred to:

(1) *Smith* v. *Standard Steam Fishing Co.*, *Burdon* v. *Gregson & Co.*, [1906] 2 K.B. 275; 24 Digest 917, *124*; 75 L.J.K.B. 640; 95 L.T. 42.

(2) *Houlder Line, Ltd.* v. *Griffin*, [1905] A.C. 220; 24 Digest 915, *104*; 74 L.J.K.B. 466; 92 L.T. 580; *revsg.*, [1904] 1 K.B. 510.

(3) *Bartell* v. *Gray (W.) & Co.*, [1902] 1 K.B. 225; 24 Digest 917, *122*; 71 L.J.K.B. 115; 85 L.T. 658.

(4) *Weavings* v. *Kirk & Randall*, [1904] 1 K.B. 213; 24 Digest 920, *145*; 73 L.J.K.B. 77; 89 L.T. 577.

(5) *Mackey* v. *Monks (Preston)*, [1918] A.C. 59; 24 Digest 919, *135*; 87 L.J.P.C. 28; 118 L.T. 65.

Appeal from an order of the Court of Appeal (Greer and Clauson, L.JJ., Slesser, L.J., dissenting), dated Apr. 12, 1938, and reported [1938] 3 All E.R. 52, affirming a judgment in favour of the respondents given by Goddard, J., at Liverpool Assizes on Apr. 20, 1937. The facts and the arguments are set out in the opinions of their Lordships.

Hartley Shawcross, K.C., and *C. N. Shawcross* for the appellant.

F. A. Sellers, K.C., *Selwyn Lloyd* and *Guthrie Jones* for the respondents.

Viscount Maugham: My Lords, this is an appeal from the judgment of the Court of Appeal affirming (by a majority) the decision of the trial judge, Goddard, J. The appellant was the plaintiff in the action. He had been employed by the Cork Insulation Co., Ltd. (who were not parties to the action), as a joiner to do work in connection with the construction of certain insulation chambers in a vessel named the Dunedin Star, and, in the course of doing that work, he suffered injuries for which he claimed damages in the action against the present respondents, who were the owners of the wet dock in which the work of finishing the vessel was being done. As appears from the above, the action was dismissed, and the question before your Lordships is whether this result is wrong, and the appellant ought to recover judgment for a sum of £760, which the judge fixed as the damages which he would have awarded if he had held that the appellant was entitled to maintain his claim against the respondents.

The work of finishing the vessel in the wet dock was done partly by the respondents and partly by other independent contractors, including the Cork Insulation Co. and J. & E. Hall, Ltd. Certain wooden staging had been erected by the respondents in No. 2 hold and in other parts of the ship. Before the launching, the respondents had completed their work in No. 2 hold, but they left the staging for the convenience of the Cork Insulation Co. and other contractors, including J. & E. Hall, Ltd., the refrigerating engineers, who used the staging before the Cork Insulation Co., and were going to use it again after the latter had completed the insulation. The respondents, however, had a gang of men who were supervising all the staging in the ship, and who made frequent examinations of all the staging. The staging had been properly constructed. It extended over the width of the hold, and consisted of planks extending 18 ins. or more beyond the inside edge of the thwarts or supports on which they rested in accordance with the regulations made by the Secretary of State under the Factory and Workshop Act, 1901, s. 79. The staging, as constructed, was lashed to the bearers, but the foreman of the Cork Insulation Co. complained that the lashing caused his men to stumble, and it was removed. The result was that the planks were loose, in the sense that they could be moved or pushed lengthways. One of them was in fact moved away from the support of its bearer, with the result that it gave way beneath the appellant when he stepped on it, so that he suffered serious injury. It is the fact that a chargehand employed by the respondents had removed the lashing in question at the request of the foreman of the Cork Insulation Co.

The shipbuilding regulations to which I have referred were directed to apply "to the construction and repair of ships in shipbuilding yards," and these yards are defined in the Factory and Workshop Act, 1901, Sched. VI, Part II (25), as meaning "any premises in which any ships . . . are made, finished or repaired." The respondents' wet dock is within these words. The regulations provide that "it shall be the duty of the occupier to comply with Parts I to VIII of these regulations." There is a proviso as regards ships which are being repaired in public dry dock to the effect that the person who contracts with the owner of the ship or his agent to execute the work of repair shall be deemed to be the occupier for the purposes of Parts I to VIII, and that it shall be his duty to comply with those parts, with some special and somewhat elaborate exceptions. There is no other guide to the meaning of the word "occupier" in the regulations. It is not, in my view, a sufficient guide to make it safe to rely upon it. The regulations as to staging are contained in Part II. Some of your Lordships will state the relevant sections in full, and for my purpose it will suffice to set out reg. 11 (*b*), which provides as follows:

> All staging shall (i) be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed; (ii) be inspected at regular and frequent intervals by a competent person.

Apart from contentions which are not now relied on, the appellant based his claim on the ground that he had suffered his injuries by reason of the failure by the respondents to maintain the staging "in such condition as to ensure the safety of all persons employed." The trial judge, GODDARD, J., found the following facts:

> . . . (*a*) that the Cork Insulation Co. were independent contractors and in no sense subcontractors to the respondents, (*b*) that the respondents were under no duty, contractual or otherwise, to provide a staging for the Cork Insulation Co., (*c*) that the staging was left by the respondents for the use of the Cork Insulation Co.'s men as a matter of convenience, (*d*) that, at the time when the staging was left

by the respondents for the use of the Cork Insulation Co.'s men, it was properly constructed and perfectly safe, and, although the planks of the staging extended 18 ins. or more beyond the inside edge of the bearers on which they rested, the planks were lashed as an additional safeguard, (*e*) that it was the Cork Insulation Co. who caused the lashings to be removed, (*f*) that, because of the removal of the lashings, one of the planks became loose, and the appellant was caused to fall, (*g*) that the fact that the respondent's men inspected the staging from time to time did not put the respondents under any duty to the Cork Insulation Co. to maintain the staging, (*h*) that the Cork Insulation Co., and not the respondents, were the occupiers of the staging, or of the part of the ship where the staging was, for the purpose of their work upon the insulation chambers. . . . A

On these findings, which I accept, he came to the conclusion that the duty of maintaining the staging imposed by reg. 11 was cast at the material time, not upon the respondents, but upon the Cork Insulation B Co.

In the Court of Appeal, Greer and Clauson, L.JJ., were in substance of the same opinion, and they did not agree with an argument, raised for the first time before them, that the respondents were responsible for compliance with the Shipbuilding Regulations simply as occupiers C of the shipyard, notwithstanding that the Cork Insulation Co. were in fact in actual occupation of the part of the ship where the staging in question was. Slesser, L.J., however, was of a different opinion. He held that the word "occupier" in the regulations means the occupier of the whole dock, and that, save in special circumstances which do not D apply in this case, there cannot, within the contemplation of the Factory Acts, be more than one occupier for one factory.

My Lords, I have not attempted to state in any detail the judgments of the Lords Justices because they are fully reported. I understand that your Lordships have formed the view that the appeal should succeed, E and that leads me to make two observations. On the one hand, any remarks of mine would, in these circumstances, have little weight, and, on the other hand, I am happy to note that the Factory and Workshop Act, 1901, no longer offends the eye of the lawyer in the statute book. I have read with care all the authorities bearing on the topic on which F this appeal turns. No clear guide is to be found in them, and even the decisions of this House are almost impossible to reconcile. If anyone should doubt this, he has only to refer to *Smith* v. *Standard Steam Fishing Co.* (1), and to read the judgments of Sir Richard Henn Collins, M.R., and of Romer, L.J. In any case, I do not think that the decision of G this House in *Houlder Line, Ltd.* v. *Griffin* (2), assists us in the present appeal. For my part, I cannot think that a "factory" in the Act means a building which can have only one "occupier." I think that "occupier" was intended to mean the person who runs any separate undertaking in any building, and who regulates and controls the work H that is done. The Act contains no definition of the word "occupier," and, moreover, the draftsman seems not to have appreciated that actions for damages would lie against the person who was responsible as "occupier" for non-compliance with any of the numerous requirements of the Act. The sanctions were fines imposed on the occupier under sects. 135, 136 and 137, with provisions for exemption in certain conditions under sects. 140, 141 and 142. With all respect to those who think otherwise, it seems to me that all these sections point to the conclusion that it was the person in actual control of the undertaking called the factory who was to be subject to penalties. Were it not for the contrary opinions of your Lordships, I should have thought that sect. 104 (1) of the Act, which relates to docks, wharves, quays and warehouses, clumsily as it is worded, contains in the last four or five lines a provision that, for the purpose of enforcement of all the provisions as to (amongst other things) accidents, and regulations for dangerous trades, including, as I think, regulations made under sect. 79, the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, is "to be deemed to be the occupier of a factory," and is, therefore, to be liable. The fact that the regulations were not made under sect. 104 does not persuade me that the word "occupier" in the case of a dock is intended to have a meaning other than that assigned by sect. 104 (1). I can see that the language of the section is obscure. To give only one instance, it is doubtful whether the section applies to warehouses far removed from any dock or shipping. In my opinion, however, the draftsman of the Act intended, by the words used, that any regulations for dangerous trades made under sect. 79 should have effect as if "every dock, wharf," and so on, were included in the word "factory," and as if the last four or five lines of sect. 104 (1) applied to such regulations. I must admit that the language of the section is not perfectly fitted to carry out that intention, but, unless the wider construction is accepted, I cannot myself see any real reason for a reference in sect. 104 (1) to "regulations for dangerous trades." It may be noted that in sect. 85 the words used are "if any occupier, owner or manager who is bound to observe any regulations under this Act," and that this phrase is carelessly used to mean "any regulations made under the foregoing provisions of this Act"—namely, regulations made by the Secretary of State. The correct words are used in sects. 82, 83, 84 and 86, and, in view of this motiveless change of language, it does not seem very difficult to construe the words in sect. 104—namely, "the provisions of this Act with respect to . . ."—as including the regulations made under the powers conferred by the Act.

I find support for these views from a careful examination of all the sections of the Act of 1901, and also of those of the Factory and Workshop Act, 1895 (including sect. 23 of that Act), bearing in mind that the later Act is mainly (though not exclusively) a consolidating Act. For myself, I would place reliance on *Bartell* v. *Gray (W.) & Co.* (3) and *Weavings* v. *Kirk & Randall* (4), which I think were rightly decided. I should therefore have been inclined to agree with the conclusions of GODDARD, J., and GREER and CLAUSON, L.JJ., and I regret that this House should have to arrive at a conclusion which seems to me unfortunate and unjust. On the other hand, I recognise the difficulties which arise on this construction, and, as your Lordships will state them, it would be waste of time for me to enumerate them, or, in the circumstances, to explain how I should answer them. Since your Lordships are agreed upon the point, I can place no reliance upon my view, but I have felt it my duty to indicate it. A number of other contentions were urged by the respondents on the appeal, and, in regard to those contentions, I need only say that I agree with your Lordships upon all of them. In the circumstances, the appeal must be allowed, with the consequences as to costs which Lord Atkin will indicate.

Lord Atkin [read by Lord Wright]: My Lords, this is an appeal from an order of the Court of Appeal, who by a majority dismissed an appeal from the judgment of Goddard, J., as he then was, in favour of the defendants at the trial before him at the Liverpool Spring Assizes in Apr., 1937. The plaintiff is a joiner, and his claim is for damages for personal injuries sustained while he was working for his employers, the Cork Insulation Co., Ltd., on a ship which was being built by the respondents, Cammell Laird & Co., Ltd., in their shipbuilding yard at Birkenhead. The action was founded on various causes of action involving allegations of negligence, but the only cause of action maintained in the Court of Appeal and before this House was based upon an alleged breach of a statutory duty imposed by the Shipbuilding Regulations, 1931, in respect of the construction and repair of ships in shipbuilding yards. In 1935, the respondents were engaged under contract with the Blue Star Line in building in their yard the Dunedin Star. At the date of the accident to the plaintiff on Nov. 6, 1935, she had already been launched, and was being fitted up in the wet dock or basin in the respondents' yard. Some of the holds were to be refrigerated. The refrigerating machinery was being supplied by J. & E. Hall, Ltd., under an independent contract with the Blue Star Line. The insulation was to be supplied by the plaintiff's employers, the Cork Insulation Co., Ltd., a subsidiary of the Blue Star Line, also under an independent contract. For the purpose of construction, the respondents had erected staging throughout the ship in the various holds. In the hold in question, No. 2 hold, they had completed their own work, but had left the staging there for the convenience of the Cork Insulation Co. and of J. & E. Hall, Ltd., and had in fact lowered it to suit the Cork Insulation Co.'s requirements, so as to give them headroom for insulating the part of the deck immediately above No. 2 lower hold. The staging extended over the whole width of the hold. As altered, it was at a height of about 16 ft. from the tank tops below, and it consisted of planks about 21 ft. to 22 ft. in length laid fore and aft on timber bearings placed about 17 ft. apart. There was thus an overhang of the planks over the bearers of at least 1 ft. 6 ins. As originally constructed, the staging was secured by a plank placed over the platform across the bearers and lashed to the bearers. When the Cork Insulation Co. came to use it, their foreman complained to the respondents that his workmen might trip over these cross-planks. They were therefore removed by the respondents' men, with the result that play was afforded to the planks to move on the bearers. The plaintiff himself was a joiner engaged in fixing tongued and grooved boards so as to form receptacles for the cork insulating material A which had to be placed between them. This material was conveyed to the staging in skip baskets, 6 ft. by 8 ft., with two transverse binders or bearers along the bottom. It was apparently the practice of those of the Cork Insulation Co.'s labourers who dealt with the cork material to drag these skips along the staging to the required spot, with the B result that from time to time the planks became displaced and lost the necessary overhang. The respondents' stagers inspected this staging, together with the other staging in the other holds, twice a day, and, when they found a plank out of place, replaced it. As Peytler, the respondents' chargehand over the staging, said, this was done practically every day. C It was routine.

On the day of the accident, the plaintiff was engaged with another joiner in fixing the boards for the insulation of a fore-and-aft beam supporting the deck. He was returning from his midday meal, had gone to the after part of the staging to pick up his tools, and was walking to his D job, when a plank on which he had placed his foot slipped from the bearing. He was thrown to the bottom, broke his right arm and his nose, and received other injuries. The judge, though he decided against the plaintiff on the question of liability, prudently assessed the damages in case the plaintiff eventually succeeded. As to the sum so awarded, E £760, there is no dispute.

The question now arises whether the respondents are liable to pay this amount of damages to the plaintiff. Questions of negligence and contributory negligence were raised at the trial, but those have now disappeared, and the only question remaining is whether the plaintiff suffered F his injuries by reason of a breach of statutory duty by the respondents. The duty is alleged to be imposed by the Shipbuilding Regulations, 1931, dated Feb. 24, 1931, made by the Secretary of State under the Factory and Workshop Act, 1901, s. 79, in respect of the construction and repair of ships in shipbuilding yards (S.R. & O., 1931, No. 133). The G Factory and Workshop Act, 1901, s. 79, provides as follows:

> Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children or any other class of persons, he may certify that manufacture, machinery, plant, process or description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of H this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

This power only exists in reference to manufactures and so on "used in factories or workshops." By sect. 149 and Sched. VI, Part II, of the Act, there are included in the definition of "factories":

> . . . "shipbuilding yards," that is to say any premises on which any ships, boats or vessels used in navigation are made, finished or repaired.

It is true that it is a condition of a shipbuilding yard that steam, water or other mechanical power is used in aid of the manufacturing process carried on by them. Messrs. Cammell Laird's yard complies with this condition.

It has been the practice of the Secretary of State for the time being, in making regulations under this section, to impose the duties of doing or forbearing to do the acts which he thinks it necessary to describe for the purpose of securing safety upon various persons concerned in the relevant processes, whether or not owners or occupiers of the factories. This practice was upheld by this House as *intra vires* in *Mackey* v. *Monks (Preston)* (5), where regulations had been made in connection with the processes of loading and unloading in docks. In the present case, the duties created by the regulations are specifically imposed upon two classes only:

> It shall be the duty of the occupier to comply with Parts I to VIII of these regulations. . . . It shall be the duty of all persons employed to comply with Part IX of these regulations.

The obligation in question in this case comes under " Part II. Staging ":

> 11. (*a*) A sufficient supply of sound and substantial material shall be available in a convenient place or places for the construction of staging.
>
> (*b*) All staging shall (i) be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed, (ii) be inspected at regular and frequent intervals by a competent person.

It is relevant to mention reg. 13, which provides as follows:

> All planks forming a rising stage at the bow end of the ship shall be securely fastened to prevent slipping and all planks forming other stages shall be so fastened unless they extend 18 in. or more beyond the inside edge of the thwart or support on which they rest.

The two questions that arise on reg. 11 (*b*) are (i) whether or not the duty to maintain the staging in such condition as to ensure the safety of all persons employed was imposed, in the circumstances, on Cammell Laird & Co., and (ii) if so, whether or not it was an absolute duty. On the first question, it appears to me that, if one seeks to inquire into the meaning of the word " occupier " in the sentence stating that it is the duty of the occupier to comply with Parts I to VIII by asking, " Occupier of what ? " the only answer can be, " Occupier of that which alone has been previously mentioned in the regulations as capable of being occupied—namely, the shipbuilding yard which is the factory within which the regulations are to operate." It is not the occupier of the " staging or that part of the ship " (Goddard, J.), " such part of the ship as was necessary for the work the Cork Insulation Co. had to do " (Greer, L.J.), " the place where the accident occurred," or " the *locus* where the staging stood " (Clauson, L.J.). Nor is " occupier " the right word to describe the person controlling the work in doing which the accident happened, or the person using the machinery which gives rise to an accident, as was contended for by the respondents. We have not to consider here the question of separate manufacturing businesses being carried on by separate occupiers in the same building, or the case where, under sect. 149 (2) with the approval of the chief inspector, a part of a factory may be taken for the purposes of the Act to be a separate factory. There is nothing in the Act or regulations which, in the present case, makes the hold or the staging a separate factory, and I can entertain no doubt A that the duty under reg. 11 (*b*) is imposed upon the occupier of the only relevant factory, the shipbuilding yard, i.e., upon Cammell Laird & Co.

I venture to think that some confusion has arisen in this case by introducing into its consideration the terms of sect. 104 (1), which B provides that, for the purpose of the enforcement of the provisions of the Act with respect to regulations for dangerous trades:

> . . . the person having the actual use or occupation of a dock, wharf, quay or warehouse or of any premises within the same or forming part thereof. . . . shall be deemed to be the occupier of a factory.

C By that section, certain provisions of the Act are applied to docks, including sect. 79, with respect to "regulations for dangerous trades," and, for the enforcement of those provisions, certain persons shall be deemed to be the occupiers of a factory. Quite apart from the fact that these notional occupiers are only treated for the purpose of the enforce- D ment of the provisions of the Act, nothing being said about the regulations made thereunder, it appears to me that sect. 104 has nothing to do with the present case. It gives power, amongst other things, to make regulations as to dangerous trades in connection with docks. The Secretary of State has made such regulations. They are the Docks Regulations, 1934, E in respect of the processes of loading, unloading, moving and handling goods, and the processes of loading, unloading, and coaling any ship in any dock. However, sect. 104, in my opinion, has nothing to do with the present regulations, which are made in respect of the construction and repair of ships in shipbuilding yards, which do not F depend upon the creation of a "notional" factory by sect. 104, and in respect of which the terms and powers of sect. 104 have not been invoked and are quite irrelevant. None of the provisions of the Act applied by sect. 104 is sought to be enforced in the present case, and the definition of "occupier" in the section has no application. For this reason, also, G the various cases cited in the judgments below and in the argument before us under the Workmen's Compensation Act, 1897, are of no assistance. In that Act, by sect. 7 the Act was only to apply to employment by undertakers in or about, *inter alia*, "a factory," and "factory" included any dock to which any provision of the Factory Acts was H applied by the Factory Act, 1895, and "undertaker," in the case of a dock, meant the occupier thereof within the meaning of the Factory Acts, 1878 to 1895. As far as I can ascertain, the only reference to a dock in the Factory Acts is in sect. 104. In any case, it clearly applied, and much ingenuity was exercised, accordingly, in seeking to apply or not to apply the benefits of the Workmen's Compensation Act to sailors or workmen in ships in dock, to which end the notional occupiers were frequently discussed. This branch of the law is now obsolete, and, in any case, being founded on sect. 104, has no relevance to the present case. I have only to add, on the present part of the case, that we were invited to say that, once a ship was afloat in a dock, she was no longer in a shipbuilding yard. This contention would, I should suppose, startle those shipbuilders whose yards include one or more basins where they complete the work of fitting up a ship after she has been launched. It would have the astonishing result of preventing the shipbuilding regulations from applying at all to work done after launching. It appears to me impossible to maintain.

If, then, the duty is imposed upon the only occupiers of this shipbuilding yard, namely, the respondents, is the duty so imposed an absolute one, or is it to be construed as limited to a duty to take reasonable care to maintain, or to maintain only while they are themselves using the staging? I can see no reason for not giving the words their ordinary meaning. Indeed, so far as I can see, all the judges in the courts below were of opinion that, upon whomsoever the duty lay, there was in fact a breach. The absolute duty in respect of acts and forbearances imposed by statutes for the protection of workmen is by this time a well-known feature of this class of legislation. It is to be found *passim* in such Acts as the Coal Mines Acts, and in the Factory Acts themselves. A striking example, as was pointed out by counsel for the appellant in his powerful reply, is to be found in the obligation to fence dangerous machinery, which, in the Act of 1901, is to be found in sect. 10. It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another. It was said that to construe this clause as imposing the absolute duty on the occupier in this case leads to such an unreasonable result as to throw doubt upon such a construction. My Lords, I cannot agree. The occupiers of a shipbuilding yard, as are the respondents in this case, have complete control over their yard, and can impose their own conditions upon those who enter the yard, and use either their own plant or that of the occupiers of the yard. They can insist upon the plant being constantly maintained in a safe condition, can terminate the licence to enter the premises or use the plant in case of breach, and can take any indemnities they think fit. In this particular case, the respondents constructed the staging. It appears that, for the use of their own men, they took the very precaution which was necessary to avoid the play of the planks by lashing them to the bearers. They could have refused the request of the Cork Insulation Co. to abolish this precaution, and, when they found, as they did day by day, that the planks were being moved, they could, by simple devices, e.g., bolting the planks to the bearers, have eliminated this particular danger. I therefore see no reason for refusing to give the words what

I conceive to be their plain meaning of imposing an absolute duty upon the respondents.

The only other matter which I need discuss is the point taken by counsel for the respondents in his well-sustained argument that, if the regulations impose an absolute duty upon the occupier of the shipbuilding yard, they are *ultra vires* so far as the duty extends to persons other than those who are in fact carrying on the dangerous trade or using the dangerous plant. My Lords, this sounds a strange contention to apply to provisions of the Factory Acts, which again and again name the occupier as the person who has to observe the precautions specified. The point seems to me to be disposed of by the decision of this House in *Mackey* v. *Monks* (*Preston*) (5), where regulations had been made under the Factory Act, 1901, ss. 79, 104, dealing with the processes of loading and unloading a ship. There, indeed, the contention was the opposite to the present, and was that the regulations were *ultra vires* so far as they sought to impose duties on persons other than the occupiers. The majority of the House held that the Secretary of State had power to impose the duties on any person on whom, in the opinion of the Secretary of State, it was reasonably necessary to impose duties in order to secure the end in view. LORD PARKER referred to what he called the second limitation to the power of the Secretary of State—namely, the regulations are to be such "as appear to him to be reasonably practicable and to meet the necessity of the case." He said, at p. 85:

> It should be observed that, with regard to the second limitation, the Secretary of State is constituted the sole judge, and if he has exercised a *bona fide* discretion his decision is final.

That statement seems to me, with respect, to be incontrovertible, and to dispose of this point. For my part, I cannot imagine a sphere in which the courts would be less likely to interfere than in debating the competency of regulations which the Secretary of State has made after publishing in advance his proposals, and after considering objections, if necessary, after an inquiry, and which have been submitted to Parliament without any disapproving resolution. These regulations appear to me to be *intra vires* the Secretary of State.

In the result, the action, which was described by the trial judge as misconceived, appears to have been founded upon a correct appreciation of the law, and I agree with the judgment given in the Court of Appeal by SLESSER, L.J. I think that the appeal should be allowed, that the judgment of GODDARD, J., should be set aside, and that judgment should be entered for the plaintiff for £760 with costs. The present appellant should have the costs of the appeal to the Court of Appeal and such costs in this House as are appropriate to a pauper's appeal.

LORD RUSSELL OF KILLOWEN: My Lords, the question which we have to answer may, I think with accuracy, be stated thus—did the Shipbuilding Regulations, 1931, effectively impose an absolute duty on

the respondents, as occupiers of their shipbuilding yard, to maintain the staging in the No. 2 hold of the Dunedin Star in such a condition as to ensure the safety of all persons employed? In order to answer this question, it is necessary to consider and determine a number of points debated before us. It is, however, unnecessary to repeat the relevant facts, which have already been stated by my noble and learned friend A
Lord Atkin.

The point which first arises is the true construction of the words in the regulations:

> It shall be the duty of the occupier to comply with Parts I to VIII of these regulations. B

Who is the occupier referred to? It is said that, because in the Factory and Workshop Act, 1901, the words "the occupier of a factory" may indicate different persons in different sections, therefore the words "the occupier" in the regulations may be given an elastic reading, and that in each particular case the relevant occupier must be sought, and that C
upon him alone falls the duty of complying with the relevant regulation. Alternatively, it was argued that "the occupier" in the regulations means the person in occupation of the particular area in which the particular manufacture or process in question is being carried on. The result on either view would be, it was said, to cast the duty of observing D
the regulations in regard to the staging here in question on the Cork Insulation Co., Ltd. I am unable to adopt either of these views. The question is not what the words "the occupier of a factory" mean in the Act, but what the words "the occupier" mean in the regulations. Incidentally, it may be observed that the word "factory" occurs E
nowhere in the regulations, which deal throughout with, and only with, the trade of one particular kind of factory—namely, "the construction and repair of ships in shipbuilding yards." In my opinion, "the occupier" referred to in the regulations must *prima facie* refer to and mean the person who is in occupation of something which has already F
been mentioned, and which is capable of being the subject of occupation. Only one such thing has before been mentioned—namely, "shipbuilding yards." Therefore, "the occupier" must *prima facie* mean the occupier of a shipbuilding yard. Accordingly, I am of opinion that, upon the true construction of the regulations, the duty in regard to the staging G
was cast upon the respondents.

It was argued, however, that the case fell within sect. 104 of the Act, and that, by virtue of that section, the Cork Insulation Co., Ltd. (having the actual use or occupation of the dock or wet basin within which the ship lay, or of some premises within that dock), must be deemed to be H
the occupier of a factory, and was, therefore, "the occupier" within the meaning of the Shipbuilding Regulations, 1931. The foundation of this argument is the view that sect. 104 operates to apply to the "notional factories" thereby created the provisions of the regulations made under sect. 79 in regard to the construction and repair of ships in shipbuilding

yards. In other words, to quote from the judgment of CLAUSON, L.J., at p. 63:

> . . for the purpose of enforcement of regulations for dangerous trades (namely, the Shipbuilding Regulations, 1931), the person having the actual use or occupation of a dock, or of any premises within the same or forming part of a dock, shall be deemed to be the occupier of a factory.

My Lords, with all deference to those who hold this view, it appears to me to be based upon a misreading of sect. 104. That section does not purport to apply to its "notional factories" the provisions of any regulations. It applies to them certain "provisions of this Act"—namely, (i) the provisions of sect. 17, (ii) the provisions of sects. 19-22, (iii) the provisions of sects. 79-86, (iv) the provisions of sect. 119, and (v) the provisions of sect. 136. As regards the last sentence of sect. 104 (1), the "enforcement" which is referred to is not enforcement of regulations, but enforcement of "those provisions"—namely, the sections of the Act to which I have referred. I may give two instances of the operation of this provision as to enforcement. Under it, the described person is to be deemed the occupier of a factory within sect. 19 (4) and also within sect. 119 (4). In my opinion, sect. 104 has no reference to the Shipbuilding Regulations, 1931, nor have those regulations any application to notional factories constituted under sect. 104. For those notional factories, regulations, if required, can be made under sect. 79, because that section is, by sect. 104, made applicable to them, although they are not factories as defined by the Act. I understand that dock regulations have in fact been made, but this action is not brought in respect of any breach of a statutory duty thereunder, but in respect of an alleged breach of statutory duty under the Shipbuilding Regulations, which, as I have stated, have no application to any notional factory under sect. 104.

It was next argued that, if, upon the true construction of the Shipbuilding Regulations, "the occupier" means the occupier of the shipbuilding yard, the regulation which casts upon such occupier the duty of maintaining this staging in such condition as to ensure the safety of all persons employed is *ultra vires* the Secretary of State, under sect. 79. I had difficulty in following the exact grounds upon which this argument was based. It is, however, sufficient to say that the decision of your Lordships' House in *Mackey* v. *Monks* (*Preston*) (5) and the opinions of LORD FINLAY, L.C., LORD ATKINSON and LORD PARKER OF WADDINGTON constitute ample authority for the proposition that the Secretary of State has power under the section to impose upon the occupier of a shipyard the duty of complying with the regulations in every part thereof.

The duty being, as I think it is, effectively cast upon the respondents, is it an absolute duty, or can they excuse themselves by saying that, by competent inspection at regular and frequent intervals, they have done everything possible to discharge their duty? I think that the duty is an absolute one. The wording is too strong to justify the milder view. The words "all staging shall . . . be maintained" point, in my opinion, to an absolute, and not to a qualified, obligation.

Lastly, it was said that there was no breach of the regulation, and that, if there was a breach, no damage flowed from it. These contentions do not seem to have been argued below. Indeed, Clauson, L.J., in his judgment treats the breach as admitted. If, as I think it was, the duty was absolute, there was a clear breach, and, if there was a breach, I can see no intervening agency which would justify the view that the damage sustained by the appellant did not flow from that breach. For these reasons, I would answer the question which I formulated in the affirmative, and I would allow this appeal.

Lord Wright: My Lords, Goddard, J., and the majority of the Court of Appeal (Slesser, L.J., dissenting) decided against the appellant, who was plaintiff in the action, on the ground that the claim was brought against the wrong defendants. The Cork Insulation Co., Ltd., who were the appellant's employers, were, it was held, the parties who should have been sued. The Cork Insulation Co., moreover, were not only the injured man's employers but were also executing the particular work in the course of which the accident occurred, and were doing so as independent contractors under contract with the building owner, and were in actual use of the staging from which he fell. On these grounds, it was held by the courts below that the Cork Insulation Co., and not the respondents, were occupiers of the particular hold or staging or part of the vessel, which, in the view of the courts below, was to be regarded as a separate factory. Slesser, L.J., in dissenting, held that the premises of the respondents, in a part of which the vessel was being constructed or finished, constituted a single shipbuilding yard, of which the respondents were the occupiers within the meaning of the Factory Act and the Shipbuilding Regulations, 1931, and that, that being so, the respondents were, without more, responsible to the appellant for the damage he sustained owing to a breach of the regulations occurring within the shipbuilding premises.

I agree with the conclusion reached by Slesser, L.J. The liabilities imposed by the Factory Act are imposed directly as a penal measure, and derivatively as a civil cause of action, in favour of an injured workman to whom, by construction of the common law, the statutory provisions create a duty, being intended to secure the health and safety of the workpeople. They are absolute, and do not depend on negligence. They are in most cases imposed on the "occupier" of the factory or workshop, whether or not he is actually in fault, though in some events he may have either a right over against an actual wrongdoer or a right of exoneration. This may appear somewhat out of the course of the common law, but the statute is remedial. It is for the protection of workpeople, and that object can best—perhaps can only—

be secured by fixing liability on a single person, and by defining the obligation in absolute and mandatory terms. In the present case, the particular liability relied upon is not based directly on the provisions of the Act, but on the provisions of the Shipbuilding Regulations, 1931, made under sect. 79 of the Act. It has been contended, indeed, though not very strenuously, that these regulations are *ultra vires* if, or because, they fix liability on the respondents, who were not the man's employers, and were not actually carrying out the process in the course of which the breach occurred. It was said that such a provision could not advance the object of securing the men's safety, because this, it is said, must depend on the conduct of those who are actually executing the work, and cannot be promoted by imposing a vicarious liability on other persons. There are many possible answers to this argument, which seems to involve a misconception of the effect of the Act, both in point of law and in point of practical convenience. I think it is enough here, however, to say that this House in *Mackey* v. *Monks* (*Preston*) (5) held that regulations made, like the Shipbuilding Regulations, 1931, under sect. 79, could not be held *ultra vires* if within the limits of the Act. Within those limits, the Secretary of State is given an absolute discretion to issue regulations which prescribe what, in his opinion, is proper and necessary in order to secure the objects intended. It was said in that case, as here, that the regulations imposed liability on the wrong person. That contention was rejected by this House. It would indeed be strange if a court of law could question the expediency or fairness of regulations which have been issued by the Secretary of State after the elaborate procedure required by sects. 80 and 81 of the Act, and after they have been submitted to both Houses of Parliament under sect. 84. I reject it here, and hold that the Shipbuilding Regulations are valid. The arguments based on sect. 104, to which I refer later, do not go to the validity, but to the construction, of the regulations.

The regulations prescribe that it shall be the duty of the " occupier " to comply with Parts I to VIII. The breach complained of was a breach of reg. 11 (*b*), which provides that all staging shall be securely constructed of sound and substantial material, and shall be maintained in such condition as to ensure the safety of all persons employed. I think it is clear (as all the judges below seem to have taken it to be established) that the staging in the present case did not comply with the regulation. It had got loose, so that the appellant fell through into the bottom of the hold, and was injured in consequence. It is true there was no breach of reg. 13, but that does not excuse the actual and unquestionable breach of reg. 11 (*b*) relied on. A failure to comply with reg. 11 (*b*) cannot, in my opinion, be excused on the ground that there was no failure to comply with reg. 13. Reg. 13 is of more limited scope. It does not follow that the staging is properly maintained simply because it is not obligatory to fasten the planks. The question, then, is, not whose neglect caused the breach, but who was the occupier, since it is the occupier on whom is placed the obligation to comply with the regulations. As the duty is absolute, he has failed to fulfil it if, for any reason, the staging was not maintained—that is, continuously maintained—in such condition as to ensure the safety of all persons employed.

There are then two main questions, (i) what were the premises which, in the application of the regulations to the circumstances of this case, A
constituted the factory ? and (ii) who were the occupiers of these premises ? The accident occurred in No. 2 lower hold of the vessel, which, subject to liens for instalments paid on account of the price, was the property of the respondents. The property in the vessel did not pass until its completion and delivery. The respondents had erected B
the staging some time previously, for the purpose of building the deck above, but, when that work was completed, had left the staging, in order to give the use of it to the Cork Insulation Co., who were building the wooden casing between which and the fabric of the vessel the insulating material was to be placed. The appellant was a joiner engaged on that C
piece of construction work, employed by the Cork Insulation Co., who were constructing the insulation under contract with the shipowners. Though the Cork Insulation Co. had in this way the use of the staging with the consent of the respondents, the respondents still continued to inspect the staging twice a day. It was said that they did so as a matter D
of routine. If it were necessary, however, I should be prepared to hold, on the evidence, that they still retained sufficient control over the staging in order to see that the regulations were complied with. However, I do not think it necessary to decide that, because, in my opinion, neither the staging, nor No. 2 lower hold, nor the work of constructing the E
insulation, constituted a separate factory. The shipbuilding yard of the respondents was the one and only factory within the definition contained in Sched. VI, Part II (25), of the Act. The respondents' yard included all the premises within its perimeter, including the fitting-out basin, or wet dock, in which the vessel was lying for the purpose of being completed. F
The work of fitting out a vessel after she is launched is often more lengthy and elaborate than the actual construction of the hull. In practice, it can only be done at a wet basin or fitting-out quay after the vessel is afloat, and hence such a basin or wharf is an essential and integral portion of the shipbuilding yard. The vessel itself is not a part G
of the factory, but is the chattel or article which the shipbuilders are constructing. It would be an anomalous position if each and every one of the numerous special contractors exercising special trades in the finishing and equipment of the vessel was to be deemed to be an occupier of a separate factory, each in its own limited compartment of the vessel, H
unless it had been specially provided by the Act or regulations, but it was not. If it is said that it is hard that the respondents should be held liable for the breach due to an independent contractor's operations, the answer is that the respondents can impose any control and supervision which they think proper as a condition of the independent contractor

being permitted to do the work. However that may be, I think that the principle of unity of responsibility is clearly established, apart from specific exceptions, in the Shipbuilding Regulations, 1931. The "occupier" on whom the duties under Parts I to VIII are imposed is not defined, but it is, I think, clear that what is meant is the occupier of the yard as a whole, who are, in this case, the respondents. This is confirmed by the specific exception of the person who contracts to repair a vessel in a public dry dock. Such person is "deemed" to be the "occupier," as contrasted with the person having the general management and control of the dock, and there are express provisions that certain duties should rest on that person, just as certain other duties are imposed also on the shipowners. It is thus manifest that special provisions are needed to shift the responsibility from the owner or letter of the dock, who would be the occupier of the dock if it were not a public dry dock. Apart from that provision, it is, I think, clear that, though the regulations do not define the occupier any more than does the Act, they contemplate one single occupier of the whole shipyard. Thus, for example, reg. 45 requires the appointment of a supervisor or supervisors to enforce the observance of the regulations and secure the safe conduct of the work generally, and this can only refer to the premises as a unit. Similarly, reg. 46, requiring the provision of ambulances and an ambulance room, is addressed to the single controlling person. Reg. 42, which requires that all parts of a ship where work is being carried on shall be efficiently lighted, cannot be read distributively as addressed separately to every contractor who is doing particular work in any part of the ship. I construe the regulations as requiring that the respondents, in their capacity of occupiers of the whole shipbuilding yard, shall be responsible for the compliance with each and every duty imposed by Parts I to VIII. When I turn to the Act of 1901, I find in the same way that, apart from certain special cases, a factory is to have a single occupier. This is sufficiently indicated by sect. 149 (2), which provides that a part of a factory or workshop may, with the approval of the chief inspector, be taken for purposes of the Act to be a separate factory or workshop, and by sect. 151, which provides that the Secretary of State may, by special order, direct, with respect to any class of factories or workshops, that different branches or departments of work carried on in the same factory or workshop may for any of the purposes of the Act be treated as if they were different factories or workshops. It is admitted that there was no such approval or order that the No. 2 lower hold should be constituted a separate factory for the purposes of the operations of the Cork Insulation Co., or at all. There are also in the Act certain sections which deal with special modifications—for instance, in the case of tenement factories. There may, it is true, be questions in certain cases whether a distinct portion of a larger area or building does not in fact constitute a separate factory in the particular case, but, in the present case, it seems to me to be clear that there was only one shipyard—namely, the whole of the premises occupied by the respondents in order to carry on their business.

Much reliance, however, has been placed by counsel for the respondents on sect. 104 of the Act, which is headed "Docks." That section (which appeared as sect. 23 in the Act of 1895) constitutes what was called by this House in *Mackey's* case (5) certain "notional" factories. That is A to say, it provided that certain premises which were not factories within the definition of factories contained in sect. 149 and Sched. VI, Part II, should be treated, for the purpose of certain specified provisions of the Act, as if they were factories. The section goes on to provide that, for purposes of enforcing those provisions of the Act, the person having the B actual use or occupation of a dock, wharf, quay or warehouse, or of any premises within the same or forming part thereof, and certain machinery, shall be deemed to be the occupier of a factory. So far as I follow the argument advanced for the respondents, the effect of this section is to vary the general meaning of "occupier" in the Act, and extend it to C the person having the actual use or occupation of any part of the premises within the respondents' shipyard. I see several objections to this argument. The word "dock" is ambiguous. Its most familiar use is as meaning an enclosed area of water in which vessels may lie for loading or unloading, or when laid up, or waiting for their turn at the berth. D This is something different from a dry dock and from a wet dock or basin used in a shipyard for purposes of the fitting out or repair of vessels, both of which may form parts of a shipyard. In these latter cases, there is not a "notional," but an actual, factory, so that the special provisions of sect. 104 do not apply. However, without affirm- E atively deciding that point, I think that it is enough here to say that the claim in this action is brought under the Shipbuilding Regulations, 1931, which are validly made under sect. 79 of the Act, and which apply to the whole premises of the shipyard, including the wet basin. It is not suggested, as I understand, that the provisions of sect. 104 apply F exclusively to whatever may be called in any sense a dock, so that the respondents' wet basin is excluded from the operation of the Shipbuilding Regulations. If, however, that were suggested, I should reject the suggestion. What I think is contended is that somehow sect. 104 qualifies in this particular application what would otherwise be the G effect of the regulations, and gives a different meaning to the word "occupier" by importing that the person in actual use and occupation of the No. 2 lower hold or the staging—that is, the Cork Insulation Co. —is "deemed to be the occupier of a factory." However, I find it impossible to bring sect. 104 into the Shipbuilding Regulations so as to H affect their operation. These are made under the general provisions of sect. 79. Sect. 104 does not provide that regulations made under sect. 79 are to have effect in the manner specially defined in sect. 104. All that it enacts is that the provisions of the Act with respect, *inter alia*, to regulations for dangerous trade are to have that effect. This means that the Secretary of State is to have the same powers under sect. 104 of making regulations as those given by sect. 79. The regulations in respect of which this action was brought, however, were not made in any sense under sect. 104. The Secretary of State has made regulations under sect. 104 dealing mainly with loading and unloading. He has made no regulations under sect. 104 dealing with shipbuilding yards. It is unnecessary to consider whether or not he could validly have done so. It is enough to say that he has not. In my opinion, sect. 104 is irrelevant to any question of the Shipbuilding Regulations, 1931, and to the issues in this case.

I have sought to come to a decision of the appeal by considering the words of the Act and regulations, which is in general the correct method of ascertaining the effect of legislation. Moreover, this question is not one in which the House is either aided or embarrassed by a wealth of decided cases more or less in point, because I think the question raised in this appeal is *res integra.* I can deal shortly with some authorities which were discussed as pointing to a different conclusion. I am satisfied, after careful examination, that they do not affect the view which I have just expressed. These cases arose under the Workmen's Compensation Act, 1897, s. 7 (2), long since repealed, which had a curious provision that the word "factory" was to have the same meaning as it had in the Factory and Workshop Acts, 1878 to 1895, including sect. 23 of the Act of 1895, and that the word "undertakers" in the case of a factory meant the occupier within the meaning of those Acts. Sect. 23 of the Act of 1895 corresponded to sect. 104 of the Act of 1901. There was, it may be, a natural desire to give the benefits of compensation to the workman wherever possible. The courts, in applying these provisions, first asked whether the place where the man was working was a place to which provisions of the Factory Acts extended, and, if so, whether the defendant was an "occupier" under these Acts. It was held in various cases that, by virtue of sect. 23 of the Act of 1895 and sect. 104 and cognate sections of the Act of 1901, these requisites were fulfilled. Thus, in *Weavings* v. *Kirk & Randall* (4), the injured man was employed in erecting pigeon-holes in a room at the top of a warehouse. There was no difficulty in applying to the words of the Workmen's Compensation Act, 1897, the precise terms of sect. 104. However, since, as I have already explained, sect. 104 has not, in my opinion, any materiality in this case, the authorities discussed seem to me to afford no assistance.

As, in my opinion, the appellant was injured in consequence of a breach of reg. 11 (*b*) committed in the shipyard of which the respondents were occupiers, I think that his claim is established, and I would allow the appeal.

LORD PORTER: My Lords, I agree that this appeal should be allowed. The appellant was employed by a company known as the Cork Insulation Co., Ltd., and was injured while working in the No. 2

lower hold of an uncompleted vessel called the Dunedin Star. This vessel was being constructed by the respondents for the Blue Star Line, Ltd., under a contract in writing, dated Mar. 27, 1935. At the time at which the appellant was injured, she had been launched, and had been placed for finishing in a wet dock upon the respondents' premises. This A wet dock formed part of the shipbuilding yard at Birkenhead which was owned by, and in the general occupation of, the respondents. At the time when the plaintiff suffered his injury, the respondents were still engaged in completing the vessel, and had some 600 men at work upon her. At the same time, No. 2 lower hold was being fitted with insulating B material, and this work, which had been begun by a company known as Hall & Co., Ltd., was being completed by the Cork Insulation Co., Ltd.

Before any insulation was begun either by Hall & Co. or by the Cork Insulation Co., the respondents had erected some staging in the No. 2 C lower hold for the purposes of their own work. Once that work was finished, however, they no longer required the staging, and, in the normal course, it would then have been dismantled, had it not been that Hall & Co. and the Cork Insulation Co. required it for the purpose of their work. The respondents themselves were not in any way concerned D with the insulation. That was done by both Hall & Co. and the Cork Insulation Co. by direct contract with the Blue Star Line, and, at the vital moment, the staging was being used solely by the Cork Insulation Co. There were, however, some few plumbers employed by the respondents at work in other parts of that hold, and a large number of E their workmen occupied elsewhere in the ship. For their use, the respondents required other staging and equipment, and kept a gang of men whose duty was to go round the ship and see that all the staging and equipment was in order. It was convenient for those men to devote a small portion of their time to the examination, and, if necessary, F repair, of the staging in the lower hold also. The respondents were, however, not under any obligation either to erect this staging or to supervise it or to keep it in repair, and evidence was given by the foreman of the gang that they took the additional work of examining the staging in No. 2 lower hold—to use his own words—" in their stride." G

The injury to the appellant, and the quantum of damage, if recoverable, have already been determined by the judge who tried the case. The question with which this appeal is concerned is as to whether or not the respondents are liable for that injury and that damage. The case as pleaded was put in two ways. First, it was said that the H respondents were negligent, and liable for their negligence. That claim has been abandoned. Secondly, however, it was said that, by the regulations in relation to shipbuilding yards made under the Factory and Workshop Act, 1901, a statutory duty to maintain the staging in such a state of repair as to ensure the safety of the workmen using it was imposed upon the respondents. By these regulations it is provided that "it shall be the duty of the occupier to comply with Parts I to VIII of these regulations." Part II contains, amongst others, the following provisions:

> 11. . . . (*b*) All staging shall (i) be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed; (ii) be inspected at regular and frequent intervals by a competent person. (*c*) All planks intended to be used for staging shall (i) be carefully examined before being taken into use, (ii) be re-examined before they are used again after the stages have been dismantled, by a person qualified to detect faults in timber.
>
> 13. All the planks forming a rising stage at the bow end of the ship shall be securely fastened to prevent slipping and all planks forming other stages shall be so fastened unless they extend eighteen inches or more beyond the inside edge of the thwart or support on which they rest.

These regulations are made under sect. 79 of the Act of 1901, and are stated to apply "to the construction and repair of ships in shipbuilding yards."

The accident appears to have happened in the following way. The planks forming the platform of the staging ran fore and aft, and the bearers were placed athwart ship. These planks did not form a rising stage, and in fact extended more than 18 ins. beyond the inside edge of the thwart on which they rested, so that reg. 13 was complied with. Whilst the respondents were themselves using the staging, they had lashed the planks to the bearers so as to prevent them from moving from their position. When, however, the Cork Insulation Co. began their work, at their request some general lowering of the staging was carried out by the respondents, and, in addition, probably because it was desired to drag the insulating cork which was being used across or along the planks in skips, and because the lashing was calculated to interfere with the skips so dragged, or to cause the men who were so dragging them to trip, that company requested the respondents' men to remove the lashings, and this request was complied with. The result was that the planks were free to move, and did in fact move from time to time, probably as a result of the skips being dragged over them. The respondents' evidence was that some complaint of this movement was made by the workmen who supervised the condition of the staging. They examined it, they said, twice daily, and, if the planks were found to have been moved, they were replaced in their proper position. On Nov. 6, 1935, however, whilst the appellant was working on the insulation for the refrigerating machinery in No. 2 lower hold, and for that purpose was using the staging, the accident the subject of these proceedings occurred. It was found by the judge to have been due to the fact that a plank resting upon one of the supports and forming part of the staging had moved, and had become so unstable as to be dislodged when the plaintiff trod upon it in the course of his duties. In these circumstances, *prima facie*, if the regulations which have been quoted, and those alone, applied, and if the respondents were occupiers, and were guilty of a failure to fulfil reg. 11 (*b*) (i), there would be no defence to this action. In making this statement, I have not forgotten the argument that the injury was not caused by the alleged breach of the statutory regulations, but was caused by the intervening act of the Cork Insulation Co., Ltd., either in requesting the respondents to undo the lashing of the planks or in dragging the skips across the planks in their then condition. No doubt if the planks had not been unlashed, and probably if the skips had not been dragged across them, no accident would have happened, but at least one cause, and, indeed, an essential cause, of the injury was the fact that the plank was loose.

It is said, however, in the first place, that the regulations are *ultra vires*, on the ground that the persons alone concerned with the safety of these workmen were the Cork Insulation Co., Ltd., and that regulations which imposed a duty of ensuring their safety upon other persons were outside the scope of the Act. It was, it was said, no more permissible to make regulations binding upon the owners of the shipbuilding yard in such a case than it would have been to make regulations binding upon some totally extraneous person. This argument has, I think, already been rejected in your Lordships' House in *Mackey* v. *Monks* (*Preston*) (5). It is true that the regulations must appear to the Secretary of State to be reasonably practicable and to meet the necessities of the case, and, therefore, as Lord Parker pointed out at p. 84 of *Mackey's* case (5), must appear to him to be such as can be readily enforced without unduly interfering with the trade to which they relate, but, subject to this limitation, the widest possible discretion is given to the Secretary of State, and it is his discretion, though, of course, it must be honestly exercised. In *Mackey* v. *Monks* (*Preston*) (5), it was held that regulations might validly impose a duty upon the owner of the ship which was being discharged in dock though a stevedore was the occupier of the plant used in the process of unloading. The present case determines only that the regulations may impose that duty upon the general occupier of a shipbuilding yard though another person may be in occupation of a particular part of it. The question is not, as it was in *Mackey* v. *Monks* (*Preston*) (5), whether or not the duty can be imposed on a person other than the occupier, but whether or not it can be imposed upon a person other than the actual user of the portion of the factory of which complaint is made. In such a case, I do not see why the obligation should not be placed upon the general occupiers where the general occupation of a shipbuilding yard, and, indeed, of a ship under construction in it, remains in them. Nor do I see why the legislation should not impose a duty upon them to see to the safety of the men employed upon the ship, even though the particular work being done is done under a direct contract between the person for whom the ship is being built and an independent contractor. It must be remembered that, whatever liens may exist in favour of those for whom the ship is being constructed by reason of payments having been made in the course of the work, the ship still remains the property of the builders until she is completed and delivered, and that, as a rule, her completion and delivery are required before they have performed their contract or can obtain their final payment.

Taking the view, as I do, that the regulations are *intra vires*, the question still remains whether the respondents are occupiers within the meaning of these regulations. Round this point the principle argument on behalf of the respondent ranged. It was said that, in construing the word "occupier," one must have regard, not only to sect. 79 together with sect. 149 and Sched. VI, but also to sect. 104. Sect. 79 gives the power to make the regulations, and sect. 149 and Sched. VI include a shipbuilder's yard amongst the premises which are declared to be factories for the purposes of the Act. Sect. 104 provides as follows :

> (1) The provisions of this Act with respect to (i) power to make orders as to dangerous machines (sect. 17) ; (ii) accidents ; (iii) regulations for dangerous trades ; (iv) powers of inspectors (sect. 119); and (v) fines in case of death or injury (sect. 136), shall have effect as if every dock, wharf, quay and warehouse and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour or canal were included in the word "factory," and the purpose for which the machinery or plant is used were a manufacturing process ; and as if the person who by himself, his agents or workmen uses any such machinery or plant for the before-mentioned purpose were the occupier of the premises ; and for the purpose of the enforcement of those provisions the person having the actual use or occupation of a dock, wharf, quay or warehouse or of any premises within the same or forming part thereof and the person so using any such machinery or plant shall be deemed to be the occupier of a factory.
>
> (2) For the purposes of this section the expression "plant" includes any gangway or ladder used by any person employed to load or unload or coal a ship, and the expressions "ship" and "harbour" have the same meaning as in the Merchant Shipping Act, 1894.

As I understand the argument, it was first claimed that the wet dock or basin in a shipbuilding yard was governed by the provisions of sect. 104, and, I suppose, thereby taken out of the category of a shipbuilding yard, or, at any rate, was to be regarded as a separate factory, though within its boundaries. This appears to me to neglect the definition of a shipbuilding yard contained in the Act in Sched. VI, Part II (25) :

> . . . any premises in which any ships, boats, or vessels used in navigation are made, finished or repaired.

Also, it appears to me to neglect the fact that, if it is not a shipbuilding yard, the regulations would not apply at all. The wet basin in question was admittedly being used for the purpose of finishing a vessel, and appears to come directly under the terms of the Act and regulations. It may well be that a shipbuilding yard, like any other premises, can be divided into separate compartments, each occupied by a different person. In such a case, each compartment would be a different factory, and each separately occupied. For that contention, however, sect. 104 is not required.

An alternative argument, however, was presented, by which it was contended that the regulations applied, not only to factories as defined in sect. 149 and Sched. VI, but also to those included under sect. 104. It was maintained, therefore, that, where a dock forms part of a shipbuilding yard, the regulations apply to it, not merely as forming part of a shipbuilding yard, but also as forming a dock, and that, consequently, the provisions of sect. 104, under which a dock is made a factory, and the person having the actual use or occupation of it or of any premises within the same or forming part thereof is to be deemed an occupier, were incorporated within the regulations. I do not think that this contention should be accepted.

By sect. 149 and Sched. VI, a shipbuilding yard as a whole is declared A
to be a factory. All that sect. 104 does is to include amongst the premises which constitute a factory certain additional premises, one of which is a dock, and to define, in the case of such premises, who is to be regarded as the occupier of them in whole or in part. Where the premises as a whole are defined in Sched. VI as a factory within the meaning of the B
Act, however, the provisions of sect. 104 are not required. The premises are already a factory, and there is no reason for making them a statutory factory under the last-mentioned section. Indeed, to judge by the collocation of the words, the primary object of sect. 104 was to deal with docks or other premises where loading or unloading took place, and C
the section is not concerned with the case where the dock forms part of a shipbuilding yard. Moreover, the regulations themselves are directed to apply to the construction and repair of ships in shipbuilding yards, a direction which is, I think, more consistent with an intention that the regulations should apply, and apply only, to shipbuilding yards D
as defined by the Act than with an intention to incorporate the provisions of sect. 104 so as to give a special meaning, in the case of docks, to the word "occupier" when it is found in the regulations.

If I am right in this view, the regulations only applied to the dock in question as part of the shipbuilding yard. It may be that separate E
occupation of the dock, or of premises within or forming part of it, distinct from that of the rest of the yard, could be shown by appropriate evidence, but, except in the sense that the Cork Insulation Co. were alone using the staging, or, as he says, this part of the ship, I do not think that the judge finds any separate occupation on the part of that F
company. Nor do I think the respondents have adduced any such proof. I do not think that the Cork Insulation Co., Ltd., were in occupation of either the staging or the hold in which their work was going on. They appear to me merely to have had the use of the staging, and to have carried on their work there. Certainly they were not in occupation G
of the ship, much less of the dock. The respondents were, I think, themselves occupiers of the yard, and, as such, liable for the performance of the provisions of the Act, and, if they did not fulfil them, for breach of statutory duty towards the appellant. Even if, however, sect. 104 applied, and the question were whether the Cork Insulation Co., Ltd., H
could be regarded as in occupation of any premises within or forming part of the dock—namely, the staging or the hold—I still think that the respondents would not escape liability: *Houlder Line, Ltd.* v. *Griffin* (2), where the decision of the majority of the House may be expressed in the words of Lord Macnaghten, at p. 224, where he is speaking of

sect. 23 of the Act of 1895, which, so far as it affected that decision, was in similar terms to those of sect. 104, and was in force at the time of the decision:

> Now it seems to me to be pretty clear, upon the true construction of these somewhat singular provisions so curiously pieced together, that the shipowner in the A present case was not the occupier of the dock where his ship was lying afloat, or of any premises within the same or forming part thereof. It is, I think, plain that by the expression "dock" in the Factory Act, 1895, is meant the solid structure and body of the dock, not the waterspace within its limits. A corresponding meaning must be given to the word "premises." I do not think that a ship lying in a dock, whether afloat or not, can be included in the description of "premises within the same or forming part thereof."

B In my view, therefore, whether the argument presented be that the dock and its contents were actually separately occupied or that they were notionally separately occupied under sect. 104, the contention fails.

There remains the question whether the respondents, assuming that C they were in occupation of the hold or staging, were guilty of a breach of reg. 11 (*b*). This, I think, is a question of fact, and, unless there was no evidence to establish it, has been found against the respondents by the judge who tried the case. Indeed, it is stated by CLAUSON, L.J., to have been conceded in argument upon the appeal. I doubt whether D it is now open to the respondents to contend the contrary, and, whatever course the case may have taken below, I think your Lordships' House must determine it on the basis of such finding and such assumption.

It was suggested that the only obligation under reg. 11 (*b*) (i) was that the staging should be constructed of sound and substantial material E and that such material should be maintained in a sound and substantial condition, that this provision did not deal with the method of constructing the staging, but only with the material used, and that the provisions as regards inspection and construction were dealt with in reg. 11 (*c*) and reg. 13. I do not think that this construction is possible. If it F prevailed, there would be no obligation upon erectors who had used good material to do more than inspect the staging which was originally, and continued to be, negligently fastened. The obligation, in my view, is to maintain the staging in such a condition, as regards both material and manner of fastening, as to ensure the safety of persons G employed. In determining whether or not there has been a breach, however, regard must be had, I think to the whole of the provisions of Part II of the regulations, and, in particular, to regs. 11 and 13, and, inasmuch as it is contemplated under reg. 13 that planks extending more than 18 ins. beyond the inside edge of the support on which they rest H need not be fastened, I find it difficult to say there is necessarily an absolute obligation to fasten them, lest those working upon the staging should knock them out of place. In the present case, however, the employees of the respondents knew, upon their own evidence, that work was being done which not only was likely to drive the planks out of place but also was actually continually doing so. In such a case, it may be that their duty was to insist upon relashing the planks, or to devise other fastenings for them, or to refuse permission for the Cork Insulation Co., Ltd., to work in the hold unless they took steps to see that the planking was so maintained as to ensure the safety of their employees. The matter, however, is one that I do not think it necessary finally to determine in the present case, and I prefer to rest my decision on this part of the case on the findings of fact of the judge in the court of first instance, and the apparently unchallenged assumption of its accuracy in the Court of Appeal.

Appeal allowed. Judgment for plaintiff for £760 with costs.

Solicitors: *Helder, Roberts, Giles & Co.*, agents for *John A. Behn, Twyford & Reece,* Liverpool (for the appellant); *Layton & Co.* (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

HUNT BROTHERS (A FIRM) *v.* COLWELL.

[Court of Appeal (Slesser and Luxmoore, L.JJ., and Atkinson, J.), **November 21, 1939.]**

Bankruptcy—Deed of arrangement—Trustee—Liability—Order given as trustee.

The defendant, who was the trustee of a deed of arrangement, ordered certain materials to be supplied for the completion of dwelling-houses forming part of the debtor's estate. The plaintiffs, who supplied these materials, were creditors, and attended the meeting of creditors at which it was agreed to appoint the defendant trustee of the debtor's estate. They were not, however, members of the committee of inspection. In the orders for the materials here in question, the defendant was described as trustee, but in no other way was his liability limited:—

Held: the description of the defendant as trustee was not sufficient to restrict his liability under the orders to the funds that he held as trustee, but the defendant was personally liable for the price of the materials supplied.

[**EDITORIAL NOTE.** Where a person signs a document for or on behalf of a principal, or in a representative capacity, he is not generally personally liable thereon, but the mere addition to his signature of words describing him as an agent or as filling a representative capacity does not exempt him from personal liability. In the present case, it is suggested in the judgment that a trustee of a deed of arrangement desiring to negative personal liability should use express words denoting that recourse is only to be had to the funds that he holds as trustee.

As to Liability of Trustee of Deed of Arrangement, see HALSBURY, Hailsham Edn., Vol. 2, pp. 437-440, paras. 597-599; and for Cases, see DIGEST, Vol. 5, pp. 1104-1108, Nos. 9010-9030.]

Case referred to:

(1) *Muir* v. *City of Glasgow Bank* (1879), 4 App. Cas. 337; 43 Digest 736, *1713*; 40 L.T. 339.

Appeal by the plaintiffs from an order of His Honour Judge Thomas given at the Newport County Court on July 20, 1939. The facts are fully stated by SLESSER, L.J., in the extracts which he quotes from the affidavit of the respondent.

Carey Evans for the appellants.

P. H. Thorold Rogers for the respondent.

SLESSER, L.J.: This is an appeal by Messrs. Hunt Brothers, suing as a firm, against Colwell, a chartered accountant, who at all material times was the trustee of a deed of assignment executed on Feb. 20, 1934, by Frank Austin Ayre, a builder. The claim is for £42 15*s*., being the balance due for the price of materials supplied to the order of the defendant. The facts, as stated in the affidavit sworn in the proceedings by Colwell—an affidavit which is stated by the judge in his judgment to be accurate—are these, so far as they are here material. At a meeting of the creditors of the debtor, which Colwell at the request of one Atkins, the solicitor who practised at Monmouth and had dealt with the affairs of Ayre, the debtor, duly attended:

> . . . it was disclosed that the debtor's main asset comprised 3 messuages or dwelling-houses then in the course of erection . . . and it was resolved by the creditors after they had considered the financial position of the debtor that he should execute a deed of assignment of his property to me this deponent as trustee for his creditors and that I this deponent should as such trustee complete the erection of the dwelling-houses so that they might be realised to better advantage for the benefit of the said creditors and that the orders for the materials required for the completion of the dwelling-houses should as far as possible be given by me as such trustee as aforesaid to firms who were already creditors of the debtor.

One of the creditors was the plaintiff firm, Messrs. Hunt Brothers, who attended the original meeting when it was agreed to appoint Colwell as trustee, but were not members of the committee of inspection. They subsequently received orders from Colwell, in respect of which their claim is now made. These orders appear in the correspondence, and have the common characteristic that, whenever Colwell acknowledges these orders for building material, he signs himself "trustee." In the supplementary accounts following upon these orders, he is either referred to, or signs himself, as trustee. So far, there is no dispute. I do not think it necessary to read these letters or accounts in detail. As I say, they have that common characteristic.

It is not disputed that these goods were supplied. The value of the goods as claimed in the plaintiff's claim is not disputed either. What is said is that, in so far as Colwell has ordered these goods in his capacity as trustee, he is not liable for payment beyond the assets of the trust. Unfortunately, as appears in para. 11 of the affidavit to which I have referred:

> The assets of the estate of the debtor when realised proved insufficient to pay even the cost of the materials so ordered by me as such trustee as aforesaid in connection with the completion of the dwelling-houses and it was found that such assets were only sufficient to enable a sum of 5*s*. in the £ to be paid to the suppliers thereof on account of the price of such materials.

There is no doubt—and it is really admitted by counsel in this case—that the mere facts that Colwell accepted these orders and dealt with the plaintiff describing himself as "trustee" would not by themselves limit his liability to the assets of the estate. That is made quite clear, if clarity be needed on such a matter, in *Muir* v. *City of Glasgow Bank* (1), a Scots case, where the opinion of all their Lordships was that the mere words "as trust disponees" would not of itself exempt the trustees from the personal liability which had been undertaken by other shareholders in the bank. Perhaps the most material passage for this case is to be found in the opinion of LORD BLACKBURN, at p. 389:

> . . if the trustees meant to limit their liability, it was for them to see that the words were sufficient to make that clear.

He had said, at p. 388:

> I have myself no doubt that if individuals enter into a contract because they are trustees, and for the benefit of the trust, it would be prudent in them to stipulate that, though they bind themselves to see that the trust funds are properly applied to fulfil that contract, their contract shall extend no further, and that they will not be personally liable to make good the deficiency, if any; and if they express such a limitation with sufficient clearness, and the other contracting party (being *sui juris*) accepts such a limited engagement, he cannot call on the trustees to do more than to fulfil that limited engagement.

In the same case, EARL CAIRNS, L.C., said, at p. 355:

> I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the testator. . . . I do not know that there is in this respect any difference in principle between English and Scotch law, although there may be a difference in the application of the principle.

It is therefore, I think, clear now beyond dispute that the mere addition of the word "trustee" by itself will not be sufficient to operate as a limitation of the liability which would otherwise arise on a person who, under a contract such as this, makes himself liable for the supply of material.

It is said, however, that there are circumstances in this case from which it ought properly to be inferred that the agreement between the parties was that the liability of the trustee should be limited to the assets of the estate. First, reliance is placed upon the fact—and it is a fact—that the plaintiff in this case, suing under the contract, was himself a creditor of the debtor, and took part in the appointment of the trustee who is the trustee of the estate. For myself, I cannot see how that carries the matter any further. The plaintiff has two different capacities. First, he is a contractor in this particular matter, and, secondly, he is a creditor of the debtor. Argument has been adduced to us on the point whether the trustee may not have certain rights of indemnity, if he incurs liability beyond the assets, against the estate or against the creditors either collectively or individually. I am not inclined to enter into these difficult questions in the present case. They do not seem to me to be relevant. The material question here is whether or not the trustee, in making this contract, has limited his liability. He has not limited it by saying that he has done what he has done as a trustee, and the mere fact that Messrs. Hunt Brothers are creditors does not seem to me in itself to justify any conclusion that a limitation of liability not otherwise provided for arose.

Then it is said that the effect of the evidence contained in the affidavit of Colwell, which he is now entitled under C.C.R., Ord. 20, r. 4, to make in lieu of giving evidence orally, is to testify to the limitation of the A liability of the trustee, and that the judge has found that the affidavit is accurate. When the affidavit is examined in this particular respect, however, I cannot see that it carries the matter any further. In para. 12, it states, first, that the plaintiff firm were one of the creditors of the debtor (I have already dealt with that matter, and, as I say, I do not B think that it affects the position at all), and, secondly, in para. 12 (*f*), that it was never the intention of the trustee to incur any personal liability. That I can well believe, and the probability is that he added the word " trustee " to his letter and to the accounts thinking that he was not incurring any personal liability. However, the affidavit goes C on to say that it was never at any time the intention of the plaintiffs, in executing the orders, to hold him personally responsible for the price of the materials supplied, or any part thereof. The opinion of the defendant concerning that intention is borne out, he states in his affidavit, by " the circumstances, facts, letters and things set forth in the next D succeeding ten paragraphs " of the affidavit, which in effect set forth the letters and accounts to which I have referred, in which the trustee is referred to as a trustee. It does not seem to me possible to infer from that somewhat nebulous evidence that, because Messrs. Hunt Brothers were creditors, they therefore did not look to the trustee beyond a E liability limited to the assets. Beyond those two matters, I can find no ground on which, evidentially and properly, the trustee could speak or swear to the intention of the plaintiff firm.

In truth and in fact, there is no evidence whatever in this case that the plaintiff firm did not treat this as an ordinary contract for the supply F of building material and did not look to Colwell in due course to pay for it. If the defendant has any rights against the creditors of this estate because he is a trustee, no doubt the plaintiff firm, among the other creditors, will be answerable for those rights. That possibility, however, has no relation to the problem here to be considered. In my view, G there was no evidence on which the judge could find in this case that the trustee had limited his liability, and therefore it follows that the plaintiffs are entitled to judgment for the full sum which they claim. I think, therefore, that this appeal succeeds.

H LUXMOORE, L.J.: I agree that this appeal succeeds. The only evidence in this case was given by affidavit. There were two affidavits by Colwell, the defendant. Counsel for the defendant has called our attention to those affidavits and to the exhibits which are referred to in them. Notwithstanding the assistance that he has offered to the court, I am quite unable to find any evidence in those affidavits that it was a bargain between the plaintiffs and the defendant that the defendant should not be personally liable for the orders that he had given. He states in the affidavit that, in giving the orders, he did not intend to incur any personal liability. I can find nowhere in the affidavit any suggestion that that intention was communicated to the plaintiffs. Certainly there is no evidence in the affidavit that the plaintiffs ever A accepted the position that Colwell was not to be subject to personal liability, and that the assets of the debtor's estate were to be the only source to which the plaintiffs were to look. That being so, I am satisfied that there was no evidence on which the judge was entitled to come to the conclusion to which he came. The inference he drew from the B documents themselves was not justified, and, in these circumstances, I agree that the appeal must be allowed.

ATKINSON, J.: I agree, and I have a word to add on one point. Counsel for the defendant agrees that, if this particular creditor had not C been a creditor of the estate, there would be nothing left for him to say, but he argued that, because the firm was a regular creditor, the trustee would have in some way a right of indemnity against it as one of the general body of the creditors, and that the firm might have a right to make the trustee pay it something which the trustee would have D some right to get back under a claim for indemnity. It is really impossible, however, to suppose that a trustee has a right to indemnity against all the creditors, and especially against a creditor who was not on the committee of inspection, and who took no share in authorising the completion of these houses. It was always open to the trustee to contract E on terms that he should not be personally liable. If the trustee is right when he says that the whole understanding was that he should not contract on terms that he was personally liable, how is it possible to say that he contracted on terms that he should get an indemnity from the creditors for a liability which *ex hypothesi* he was not to incur? I F think that this right of indemnity is a myth, and that there is really nothing to be said to support it. I agree that the appeal must be allowed.

Appeal allowed with costs on Scale B.

Solicitors: *Wrentmore & Son*, agents for *Thos. John & Co.*, Cardiff G (for the appellants); *Robbins, Olivey & Lake*, agents for *Frank Lewis & Son*, Newport, Mon. (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

COOPER *v.* LUXOR (EASTBOURNE), LTD.

[COURT OF APPEAL (Scott, MacKinnon and du Parcq, L.JJ.), **October 26, 27, December 4, 1939.]**

Agency—Remuneration—Commission—Contract to pay commission on completion of sale of property—Willing purchaser found—Justification of refusal to complete—Transaction carried through by sale of shares in company and not by sale of company's property.

The defendant companies wished to dispose of certain property, and agreed to pay the plaintiff a commission on the completion of the sale to any purchaser whom he could introduce. He did in fact introduce a willing and able purchaser, but the defendant companies then determined to effect the transaction they had in mind by a sale of the shares of the companies and not to proceed with the sale of the property. It was also contended that an arrangement whereby the plaintiff was to share his commission with an auditor of the companies was illegal since it was not disclosed to the companies and that the plaintiff's contract was thereby rendered unenforceable :—

HELD : (i) there was not just excuse for the defendant companies refusal to complete the sale.

(ii) the work given to the auditor had nothing to do with his work as auditor and did not in any way affect the transaction here sued upon.

(iii) directors of a private company as well as those of a public company, owe a paramount duty to the company, which is a separate legal entity, of being disinterested in all their dealings in its affairs.

Decision of BRANSON, J. ([1939] 1 All E.R. 623) *reversed.*

[EDITORIAL NOTE. The Court of Appeal have reached a different conclusion from that arrived at by BRANSON, J. Perhaps the better view is that they have done so upon a different view of the facts, but, while the Court of Appeal do not suggest that the question of " just excuse " in this case is one of law, they would appear to hesitate to describe it as one of pure fact. For the purposes of this case it was not necessary to attempt a legal definition of " reasonable cause " or " just excuse," for, upon the view of the facts which commended itself to the Court of Appeal, the acts of the defendants were equivalent to an arbitrary or capricious withdrawal from the negotiations.

AS TO JUSTIFICATION OF VENDOR IN REFUSING TO CONTINUE NEGOTIATIONS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 261, 262, para. 435 ; and FOR CASES, see DIGEST, Vol. 1, pp. 508-512, Nos. 1753-1769.]

Cases referred to :

(1) *Trollope (George) & Sons* v. *Martyn Bros.*, [1934] 2 K.B. 436 ; Digest Supp. ; 103 L.J.K.B. 634 ; 152 L.T. 88.

(2) *Trollope (George) & Sons* v. *Caplan*, [1936] 2 K.B. 382 ; [1936] 2 All E.R. 842 ; Digest Supp. ; 105 L.J.K.B. 819 ; 155 L.T. 365.

(3) *De Bernardy* v. *Harding* (1853), 8 Exch. 822 ; 12 Digest 334, *2805* ; 22 L.J.Ex. 340 ; 21 L.T.O.S. 158.

(4) *Mackay* v. *Dick* (1881), 6 App. Cas. 251 ; 12 Digest 431, *3494*.

(5) *Atkinson* v. *Ritchie* (1809), 10 East, 530 ; 41 Digest 464, *2955*.

(6) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 ; 12 Digest 371, *3093* ; 32 L.J.Q.B. 164 ; 8 L.T. 356.

(7) *Prickett* v. *Badger* (1856), 1 C.B.N.S. 296 ; 1 Digest 509, *1754* ; 26 L.J.C.P. 33.

APPEAL by the plaintiff from a judgment of BRANSON, J., dated Feb. 7, 1939, and reported [1939] 1 All E.R. 623, where the facts are fully set out.

Cyril Miller for the appellant.

H. St. John Field, K.C., and *F. W. Beney* for the respondents.

Miller : The refusal to complete was unreasonable as the reason for non-completion did not concern the property to be sold, but what was to be done with the purchase money after it had been paid. The purchasers were always ready and able to complete.

Field, K.C. : The matter was still in negotiation and the parties never arrived at a completed contract. The case is within *Trollope (George) & Sons* v. *Caplan* (2), rather than *Trollope (George) & Sons* v. *Martyn Bros.* (1). The vendors were threatened with an action if they completed the sale and that is a just excuse for breaking off negotiations. There is only a limited obligation not to break off negotiations. An auditor of a company cannot receive any remuneration not voted at a general meeting and it is improper that he should receive a commission.

Miller in reply.

Scott, L.J. : In this case, the plaintiff's claim is for a lump sum commission of £10,000 which he alleges by his statement of claim that Luxor (Eastbourne), Ltd., and Regal (Hastings), Ltd., the two defendant companies, agreed to pay him in the event of his finding a suitable purchaser at a price of not less than £185,000 for two freehold cinema theatres at Eastbourne and Hastings, owned by the respective companies, and two leasehold theatres at Hastings to which the second defendant company was in a position to make title. He further says that he did in fact find a purchaser both ready and willing to buy at the defendants' named price—namely, another cinema company named London and Southern Super Cinemas, Ltd. (the name was subsequently changed by omitting "Super")—and he claims payment of £5,000 from each defendant company. In the alternative, the plaintiff claims equivalent damages for breach of an implied term of the contract of employment that, in the event of the plaintiff finding such a purchaser :

> . . . the defendant companies would each of them do nothing to prevent the satisfactory completion of the transaction so as to deprive the plaintiff of the commission which they had each of them agreed to pay [and that they did so prevent him].

The statement of claim also alleges in effect by para. 3 that, by an agreement known and assented to by both defendant companies through their solicitor, a Mr. Garton, who was the regular solicitor of both companies and acting for them and with their authority in this matter, the plaintiff had agreed to divide the commission, when paid, between himself and one Ewbank (who had been originally asked to find a purchaser) in the proportions of 60 per cent. and 40 per cent. This was not a material allegation for the statement of claim, although it was relevant in evidence for the plaintiff as part of the history of the transaction, but it was made directly material as an issue by an amendment which the defendants introduced into their joint defences 3 months before the trial (para. 9), stating that Ewbank was auditor of each company and alleging that the sharing agreement made between the plaintiff and him was:

> . . . corrupt and illegal in that it was unknown to and concealed from the defendants and provided the said Ewbank with a secret profit for himself . . .

The defendants also stated in their joint defences that, by reason thereof, A any promises of remuneration made to the plaintiff by Ewbank, if they were otherwise binding on the defendants (which is denied), were unforceable. On the appeal, counsel for the defendant companies asked leave to strike out the word "corrupt," but that deletion, if made, would not alter the substantial nature of the allegation. The other defences B were denials and a contention that the companies could not have contracted to employ the plaintiff, because no agreement was ever made with him by anybody who had authority to bind the companies.

At the trial, counsel for the plaintiff first called Ewbank to prove the contract of employment, so far as it was oral, and to establish various C statements of fact appearing in the correspondence and prove the work done by the plaintiff and himself. Then he called one Burton, the chairman of the London and Southern Cinemas Co., to prove that the plaintiff did in truth find a purchaser who was both willing and ready to buy at the defendants' price. Then he called the plaintiff himself, D and, lastly, one Allwood, of whom as a witness to truth the judge spoke in high terms in his judgment. He was a son-in-law of one Walter Bentley, who had died on Sept. 11, 1935, and had been the majority shareholder in the Hastings company and a substantial shareholder in the Eastbourne company, managing director of both, and, to quote E Ewbank's expression, had "practically controlled the business." The companies were private companies, with the same directors in each, the same auditor, Ewbank, and the same solicitor, Garton. In 1935, Walter Bentley was getting old, and, particularly in the summer of that year, was failing in health. He was anxious to get rid of his business interests. F He had consequently asked Ewbank to get him an offer for the Regal and Luxor theatres, and promised him commission. Thereupon, in about June or July, 1935, Ewbank saw Cooper, the plaintiff, whom he had known for two or three years in business, and who was a man interested, *inter alia,* in cinemas. In giving evidence, Ewbank called him his G "client," but that word is so often misused by business men as merely meaning a business friend that, in my view, no importance attaches to its use by Ewbank in such a context. For some time prior to Walter Bentley's death, Allwood had acted as general manager for him for all the companies he controlled, including the two defendant companies, H and his evidence strongly supported the plaintiff's case. At its close, the defendants elected to call no evidence, which was somewhat surprising. Not only had the plaintiff's witnesses given evidence which, if accepted, in my view substantiated the plaintiff's case, but also the defence had specifically denied every allegation in the statement of claim, had definitely asserted that none of the persons who, according

to the plaintiff, had purported to employ him, had authority on behalf
of either company to do so, and had contained the late amendment
alleging secrecy on the part of the plaintiff and complete ignorance on
the part of the defendant companies, and had made a charge of illegality
and corruption against their auditor Ewbank.

The judge stated early in his judgment what seemed to him "the A
result of the evidence with regard to the facts," and, in doing so, made
a series of findings, nearly all wholly in favour of the plaintiff, which
should, in my opinion, have resulted in an award of damages on the
plaintiff's alternative claim, which the judge held was the right way for
the plaintiff to put his case. Indeed, the judge would have so decided B
had he not felt bound to hold, as he said, quoting certain expressions
from the majority judgments of Greer and Maugham, L.JJ. (as they
then were), in *Trollope (George) & Sons* v. *Martyn Bros.* (1), that the
defendants had, on the facts before him, a "just excuse" or a "reasonable
cause" for not carrying through the transaction with the ready C
and willing purchaser whom the plaintiff had found for them. The actual
decision of the court in that case was that, in the contract of employment
of a "commission agent," so called, there is implied a promise by
the employer not to prevent the "agent" from earning his commission,
and that decision is, of course, binding on us. Indeed, it was followed D
by the Court of Appeal in *Trollope (George) & Sons* v. *Caplan* (2), but,
in my view, the final decision of Branson, J., for the defendants was
not, on the facts of the present case, warranted either by the decisions or
by anything said in those cases, and I am unable to agree with it.

In order to explain the difference between his view and mine, I must E
summarise the facts in evidence in order to show what, in my view, the
real position was at the time of, and in relation to, the "just excuse"
which the judge thought operated here as a good defence. Fortunately,
most of them appear in the judge's own finding of fact. The gist of
the findings was as follows. (1) The directors of the two defendant F
companies, each board having the same personnel, had made up their
minds that the best way of getting rid of their interests was for the
companies to sell the properties, although Branson, J., thought that
the Bentley family favoured the method of getting rid of their shares.
His reference to the Bentley family meant, first, Harry Bentley, who G
was joint administrator with his mother of the estate of his father (who
had died intestate), and had become a director of each company in his
father's place, and, secondly, Allwood, who was, as he said himself,
"the prime mover in everything that was done, so far as the family
was concerned." (2) Garton, the companies' solicitor, had full authority H
from the directors at the material times (*a*) to negotiate for the sale of
the properties, (*b*) to employ the plaintiff to find a purchaser at their
fixed minimum price, and (*c*) to agree to pay him a "procuration fee."
(3) Garton first instructed Ewbank to find a purchaser. (4) Ewbank
approached the plaintiff because the plaintiff was in touch with a Colonel

Burton, who, as head of a group of cinemas under the heading of London and Southern Cinemas, Ltd., was a likely purchaser. (5) According to Colonel Burton's own evidence, Ewbank and Cooper "jointly introduced the matter to him." (6) All the directors of the defendant companies knew and assented to the figure of £10,000 for the commission to Cooper and Ewbank, subject to the stipulation that the defendant companies should get not less than their price of £175,000, and that money for the commission beyond that price should be found by the purchaser. This stipulation was agreed to by Colonel Burton, and his offer was, therefore, for £185,000. (7) The judge thought that what the contract of employment exactly was appeared clearly enough from the letter of Oct. 11, 1935, from Garton to Ewbank, and he quoted from Garton's letter as follows:

> . . . on completion of the sale of the two leasehold cinemas at Hastings, and the freehold cinemas at Hastings and Eastbourne, respectively, to the London and Southern Super Cinemas, Ltd., a procuration fee of £10,000 is to be paid to Mr. Norman Cooper, being £5,000 in respect of each of the freehold cinemas at Hastings and Eastbourne.

I cannot think that the judge intended to suggest that that letter contained the whole contract. In my opinion, it did not do more than confirm the fee payable to the plaintiff on completion. (8) The other directors of Regal (Hastings), Ltd., were in a position to require the transfer to that company of the two leasehold theatres at Hastings without payment, and were, therefore, in a position to sell them. (9) The proposed sale of the four theatres never took place, either to Colonel Burton's company or to any other purchaser.

These findings are, as a whole, favourable to the plaintiff's case, and I have no positive criticism to make on any but No. 7, the contract of employment. With that, and with the extent to which the plaintiff had performed it, I will deal presently. There is, however, a comment which I will make now upon a passage in the judgment, at p. 626, which bears upon what I have called his finding No. 2:

> A great contest has arisen as to whether Mr. Garton was ever authorised by the board of either company to employ Mr. Ewbank, or, through Mr. Ewbank, Mr. Cooper.

He reviews the evidence, finds that the directors had full knowledge of the steps taken by Garton, including the contract to pay to the plaintiff the procuration fee of £10,000, and concludes that Garton had their authority. With his conclusion, and with the reasoning which led him to it, I agree, and also with his criticism of the defendants for raising the contest of fact and then not calling either the directors or Garton. When, however, he said that neither side had thought right to help the court by producing any of the directors, or even Garton, I cannot help feeling that he was less than just to the plaintiff's side. Why should the plaintiff call the defendants' witnesses? He had called Allwood, their managing director, who had corroborated much of the oral evidence already given, and that evidence, together with the correspondence and the minutes of the Regal company's board meeting of Oct. 2, made at the lowest a strong *prima facie* case calling for answer, if any answer was forthcoming.

I now come to the reason why the theatres were not sold in the end, and it is to be remembered that it was just this reason which the judge held was a "just cause" excusing the defendant companies from liability to the plaintiff. The plan as regards the sale to the London and Southern Super Cinemas, Ltd., was that the two freehold theatres should be conveyed direct by the respective defendant companies, but that the leases of the two leasehold theatres at Hastings should be acquired by a new company named Hastings Amalgamated Cinemas, Ltd., which the directors of Regal (Hastings), Ltd., had caused to be registered, and that the new company should join in the documents of sale and assign the leases to the purchasing company. At the time when that arrangement was devised, it was intended by the directors of Regal (Hastings), Ltd., that their company should apply for, and be allotted, all the shares in the new company, and an arrangement had been made by them that the Regal company's share of the £175,000 net purchase money—namely, £92,500—should be allocated in the documents of sale in a particular way—namely, £77,500 for the Regal Theatre, payable to that company, and £15,000 for the two leasehold theatres, payable to Hastings Amalgamated Cinemas, Ltd. In that case, the Regal company would get the £77,500 in cash and the £15,000 in the form of value added to their shares in the new company. Most of the above plan is recorded in the letter of Oct. 3, 1935, from Messrs. Bulcraig & Davis, solicitors, which was put to Allwood by counsel for the defendants in cross-examination.

The rest of the facts are to be found in the evidence of Allwood and Ewbank. The letter of Oct. 3 was written on behalf of Harry Bentley, acting both as a director and as his father's administrator on behalf of the family estate—that is, including Allwood himself. It was a protest addressed and sent to each of the other directors of the Regal company personally. It alleged what, if true, was a scandalous attempt by the directors, or some of them, to defraud their own company in order to benefit themselves. The device they were accused of adopting was, as a board, to reduce the Regal company's intended holding in the new company from all the shares—5,000 £1 shares—down to 2,000 shares (which that letter says had been allotted on Oct. 2, no others having been then allotted), and then to divide up the remaining 3,000 allotments amongst themselves in their personal capacity, the purpose and the result being that the Regal company would be deprived of 60 per cent. of the value of the purchase price of £15,000 allocated to the new company for the two leasehold theatres, and the directors would get that 60 per cent. in shares which they could then at once sell on the market at a large premium. That grave charge was plainly made in the letter. The evidence of Ewbank and Allwood for the plaintiff supports it, and the directors concerned did not come forward to deny the statements of fact, nor make any attempt to justify their conduct. It is the fact that the letter also protested against the size of the commission which the boards of the two companies had agreed to pay, but, after all, that agreement had been made, and was binding on the companies. By then, the plaintiff had wholly performed his part of the contract of employment, for he had found the purchaser who was ready and willing to pay the defendants' minimum price of £175,000 plus the £10,000 more in order to cover the agreed commission, or £185,000 in all. That Colonel Burton's company was both ready and willing to carry the transaction through is, in my opinion, established by his oral evidence, and the correspondence is wholly consistent with that conclusion.

However, that is not the end of the evidence showing how wilful was the defendant companies' breach of their contract with the plaintiff. The individual directors, on receipt of Messrs. Bulcraig & Davis's letter, decided not to face the prospect of legal proceedings, and, for reasons known to themselves, but not explained in court (as they did not go into the witness-box), they decided, acting as the board of the Regal company, that that company should abandon the sale of the four theatres to Colonel Burton's company, although the latter company was ready and willing to buy at their figure, in order that they, the directors, acting in their private capacity as shareholders, might sell the shareholdings owned by themselves and certain friends, which carried control, to another company altogether, the Union Cinemas, Ltd. Then, acting as the board of the Luxor company, they made that company keep step with the Regal company in its treatment of the plaintiff, and then did the same with the shareholdings of themselves and their friends in that company.

In these circumstances, I am of opinion that the companies had no "just excuse" or "reasonable cause" which could justify their attempt to ignore their contract of employment of the plaintiff and to prevent his earning his commission. Indeed, I regard that attempted defence as a most unjust excuse. The defendant companies acted none the less arbitrarily in relation to Colonel Burton's company that, by reason of the "subject to contract" provision in the letters which contained the business terms of the bargain, they were within their legal rights in throwing that company over. In relation to the plaintiff, however, they acted both arbitrarily and also in breach of their promise to him which the judge, following the common law principles, reaffirmed by this court in *Trollope* (*George*) *& Sons* v. *Martyn Bros.* (1) and *Trollope* (*George*) *& Sons* v. *Caplan* (2), found implied in the contract of employment. It is clear from what the judge says that he would have given the plaintiff damages for that breach but for his thinking that what the majority of the court had said in those cases required him also to find "reasonable cause" or "just excuse" in the decision of the directors of the defendant companies to abandon the plan of selling the properties, and instead to sell the shareholdings of themselves and certain friends which carried control of the companies, and, therefore, of the companies' undertakings, to another purchaser—namely, the Union Cinemas, Ltd.—who had made an offer for them through Allwood at the price of £175,000. It did not appear what majority of the shares the directors and their friends between them held, although it was evidently sufficient to give the purchaser control. The essential point, however, is that, so far as the plaintiff's A contract was concerned, this *volte-face* by the boards from a sale by the companies of their properties to a sale by the directors as shareholders of their shares in my opinion could not in law be either a "just excuse" or a "reasonable cause" for throwing over the plaintiff's contract. The *volte-face* was apparently effected at the very board meeting at which B Messrs. Bulcraig & Davis's letter was received. It would seem also that Garton, the solicitor—at least as legal adviser—was party to these proceedings of the directors, for it may reasonably be inferred that he was present on that very day, namely, Oct. 3—as he had been the day before, when the board of the Regal company is minuted as "accepting" the C offer of Colonel Burton's company, for, on Oct. 24, there is a minute of the Luxor company in which his bill of costs of £251 10*s.* for "negotiating fee on the sale of the company's undertakings for £82,500 and attendances" was passed by the board for payment. The bill itself shows dates for the attendances and the like from Oct. 2 to Oct. 24. The D word "undertaking" shows that the sale for the negotiating of which he was to be paid by the company was not of its theatre but of the control of the company through the transfer of shares, from which it would seem to be clear that he at least knew about that sale. As he did not give evidence, it would not be right to come to a final conclusion E against him, but how he could have found it consistent with his conscience to write on behalf of the defendant companies on Oct. 8 to the London and Southern Super Cinemas, Ltd., accepting their "subject to contract" offer to buy the theatres it is hard to conceive, and it is, if anything, even harder to imagine any explanation of his letter of Oct. 11 F to Ewbank in answer to the latter's letter of Oct. 2 enclosing Colonel Burton's offer from his company to buy the theatres.

The features of the evidence to which I have just called attention seem to me, not only to emphasise the deliberate and arbitrary character of the breach by the defendant companies of their contract with the G plaintiff, but also to show how improper the conduct of the directors was towards their own company, to which they owed the paramount duty of being disinterested in all their dealings in its affairs, and, therefore, to exclude still further the defence of a "just cause." In the case of private companies, it is of peculiar importance that business men acting H as directors should never forget, as they sometimes do, that, in the eye of the law, the company they serve is an entirely separate person. They have no right to disregard that statutory person's right to single-eyed service, nor to ignore the machinery and rules of the Companies Act in order to further their private interests. The public policy upon which the privilege of limited liability is given to companies, private as well as public, is that the directors shall observe the trust which Parliament has reposed in them. It is the chief protection of creditors. It is just that disregard of their duty to their own company of which the directors here were guilty when they first tried to deprive Regal (Hastings), Ltd., of three-fifths of the purchase price of the leasehold theatres and then substituted a sale of their own shares for the sale of the company's theatre. Out of such conduct no " just excuse " could arise to answer the plaintiff's claim.

There is not much law in this case which needs consideration, but with such as there is I will now deal. After the full discussion of the law as to the implications of a contract of commission agency, and the detailed examination of all the more important previous decisions, which took place in this court in *Trollope (George) & Sons* v. *Martyn Bros.* (1) and *Trollope (George) & Sons* v. *Caplan* (2), it would be superfluous—and, indeed, in this court, improper—to embark on any general re-statement of the law upon which those decisions depended. However, there are certain features in the facts here which somewhat distinguish the case before us from both of those cases, making its solution simpler. (*a*) The contract of employment is not quite the same as in either of those cases. (*b*) The stage reached in the negotiations between the employer and the would-be purchaser found by the agent differs. In *Martyn's* case (1), it was more advanced, for all the terms of the written contracts of sale had actually been passed by the solicitors on each side. In *Caplan's* case (2), it was much less advanced, for the negotiations broke down at an early stage through a mistake by the employer in the information he had given to the agent concerning the actual pecuniary yield of the property he wished to sell. Let me contrast the position in the present case. (*a*) The contract of employment entered into by the defendants with the plaintiff was, in my opinion, quite simply this: " If you procure a purchaser ready and willing to buy the 4 theatres and to pay us £185,000 in cash for them, we will pay you out of the purchase money when received on ' completion ' £10,000." It follows that, when, at the trial, the plaintiff established the fact, as I think he did, that Colonel Burton's company both wanted to buy and were ready to buy, because they had arranged, or were able to arrange, their finance, he proved complete performance by himself of his part of the contract of employment, although his right to demand payment according to its tenor would not then accrue due, for he had agreed to wait for his money until completion took place as between vendor and purchaser. However, if he had performed his part, and if the true reason why the sale fell through was the unwillingness of the boards of the defendant companies to carry out the deal, then there came into operation the implied promise of the defendant companies to do nothing to prevent the deal going through, so as to prevent the plaintiff from earning his commission after he had done all he had promised to do. In my opinion, this is exactly what the defendants did do, and, by their own action, they entitled the plaintiff, by way of damages for breach, to a sum approximating to the whole commission.

In *Martyn's* case (1), the contract of employment at first was simply that of the ordinary house and estate agent "to find a purchaser," meaning at a price and on terms satisfactory to the vendor. That type A
of commission agency contract, of course, leaves the employer free (i) to sell through another agent, (ii) to find a purchaser himself, or (iii) to say that the price and terms of the purchaser found by the agent do not satisfy him. In *Martyn's* case (1), however, in the first letters exchanged between the plaintiffs and the defendant a minimum figure was named, B
and the condition "on completion" added, so that then the contract became similar to that which I think was the contract here from the start. There the fact that the terms of the contracts of sale were mutually approved afforded conclusive proof that the plaintiff had found a ready and willing purchaser. It followed, therefore, quite logically, that the C
plaintiffs were entitled to damages equal to the whole commission, since it was solely the fault of their employer that they failed to earn the scale commission which they claimed. Here, if Colonel Burton's evidence could be accepted quite at its face value, it would follow that the damages should equal the whole commission. In *Caplan's* case (2), there was D
obvious room for doubt as to whether or not the purchaser there would have gone through with the transaction if the defendant vendor had never made the mistake he did, and so the court left it to the county court judge to estimate the chance. In the present case, there is much less doubt, but I cannot say that even Colonel Burton's evidence excludes E
all risk of breakdown of the final negotiations without blame to the vendor companies.

There is one other difference between this case and *Martyn's* case (1) and *Caplan's* case (2). In both of those cases, the contract of employment was in writing. In *Caplan's* case (2), it was in writing from the F
outset. In *Martyn's* case (1), it was reduced to writing when the agent first wrote and the defendant replied by letter. Here, in my view, the contract was never wholly reduced to writing. "Implied terms" is an expression normally used in regard to the interpretation by the court of a written contract, but there can be no reason why the implication G
of a necessary term from the essential nature of the bargain made should not be made in the case of an oral contract, or contract partly oral and partly inferred as a fact from conduct. In *De Bernardy* v. *Harding* (3), Alderson, B., said, at p. 824:

> Where one party has absolutely refused to perform, or has rendered himself in- H
> capable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a *quantum meruit* for the work actually done.

In *Mackay* v. *Dick* (4), there are enunciations of a similar principle applicable to conditions precedent. It was a Scottish appeal, but I regard the principles expressed by LORD WATSON, at pp. 270, 271, as applicable to English law also :

> The respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test ; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition. The passage cited by LORD SHAND from BELL'S PRINCIPLES (§ 50) to the effect that, "If the debtor bound under a certain condition has impeded or prevented the event, it is held as accomplished. If the creditor had done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement," expresses a doctrine, borrowed from the civil law, which has long been recognised in the law of Scotland, and I think it ought to be applied to the present case. . . . In the view which I have taken of the judgment under appeal, any general allegation by the appellant, to the effect that the machine would not conform to contract, is irrelevant, because, according to that view, the machine must be held to have satisfied the contract test, which was not applied, owing to the default of the appellant.

That primary principle of the law of contract applying to conditions is applicable here to the condition of payment "on completion." The plaintiff had performed the whole of his part, but was still subject to the condition, and ran the risk of Colonel Burton's company failing to complete. It is impossible to ignore that risk, and, having regard to it, I think it right to make an allowance for the risk and to fix the figure of damages at £8,000.

I have now disposed of the main issues of fact and law in the case. There were, however, two particular defences raised upon which I agree with the judge in rejecting them. The first was that the directors had no power under the memorandum and articles to sell the company's chief property. Clause 3 (*b*) of the memorandum, and arts. 1 and 2 of the articles of association (as applying Table A and art. 2, not excluding art. 67 of Table A) are sufficient to dispose of that doubt. The second was that the directors could not employ a man who was the company's auditor to perform the work of, or to share the commission of, the plaintiff for finding a purchaser. The answer is that such work had nothing to do with his vouching, *ex post facto*, the correctness of the company's accounts, and I can see no reason why an honest auditor should not accept such an employment as was offered Ewbank here. I think that the judgment below should be set aside and that judgment should be entered for the appellant for £8,000 with costs here and below.

MACKINNON, L.J. : The plaintiff sues the defendant companies for breach of contract. He says they promised to pay him £10,000 if he carried out certain work for them. He admits that his task has not been accomplished, but he says that that was only due to the defendants having prevented its accomplishment. He therefore claims, not the promised remuneration, but damages for breach of contract, alleging that it was an implied term of his employment that the defendants should not do, or fail to do, anything necessary to the fulfilment of his task.

The case, therefore, involves the consideration of an implied term in a contract, whether one is to be implied, and in what terms. This is a branch of the law in which there has been much discussion in modern times, and considerable development of the old common law. Nowhere is that development more remarkable than in the doctrine which may be referred to under the catchwords "frustration of contract." In 1809, LORD ELLENBOROUGH, C.J., in a classic judgment in *Atkinson* v. *Ritchie* (5) laid down, at p. 533, that the rights and duties of the parties to a contract:

> . . . are conclusively fixed by the terms of their own written contract. No exception which is not contained in the contract itself, can be engrafted upon it by implication as an excuse for its non-performance. . . . When the party by his own contract creates a duty or charge upon himself, he is bound to make it good . . . because he might have provided against it by his contract.

The first notable departure from the rigour of that doctrine was in 1863, when *Taylor* v. *Caldwell* (6) was decided by virtue of the sort of implication of which LORD ELLENBOROUGH, C.J., denied the possibility.

The particular contract in this case was an agreement by the defendants that they would pay the plaintiff £10,000 if he found a purchaser who would buy for £175,000 two freehold theatres and two leasehold theatres owned by the defendants. The plaintiff says that he found and introduced such a purchaser, able and willing so to purchase, and that the only reason why the purchase did not materialise was because the defendants refused to carry it out.

It was settled as long ago as 1856 in *Prickett* v. *Badger* (7) that, in such circumstances, the commission agent may sue the principal for remuneration. It was probably because of the comparative novelty at that date of the admission of implied terms that the judges there put their decision rather on the ground that the agent may sue on a *quantum meruit*, but I think that they do recognise the existence of the necessary implied term.

These considerations, however, are of only historical and academic interest, in view of two recent decisions in this court. In the present case, the offer by the purchaser found by the plaintiff was expressed to be "subject to contract." That is not an offer which, by acceptance of the vendor, can create a contract. It is in truth an intimation of willingness to negotiate a contract, together with an intimation that, if such negotiations succeed, the purchaser is willing to pay a certain price. Until all the terms of a contract have been settled and the parties have signed, either side is at liberty to recede and abandon the project.

This was the nature of the offer procured by the agent in *Trollope (George) & Sons* v. *Martyn Bros.* (1), and in *Trollope (George) & Sons* v. *Caplan* (2). In the former case, it was held by the majority of this court that it was an implied term of the contract with the agent that the principal would not exercise his right to refuse to go on with the negotiations "without just cause" or "without reasonable cause" (as it is put by GREER, L.J., at p. 452), or "without any reasonable ground" or "unless at any rate he has some just excuse" (as it is put by MAUGHAM, L.J., at p. 456). In *Trollope (George) & Sons* v. *Martyn Bros.* (1), the full terms of the contract of sale had been agreed, and the purchaser had actually signed, when the vendor refused to go on. In those circumstances, it was held that the damages to which the agent was entitled for breach of the implied term were his full promised commission. In *Trollope (George) & Sons* v. *Caplan* (2), the refusal of the principal was at an early stage of the negotiations. The county court judge, thinking he was following *Trollope (George) & Sons* v. *Martyn Bros.* (1), gave the agent his full commission, but the Court of Appeal held that the measure of his damages was the value of the chance that the negotiations, but for the act or default of the principals, would have resulted in a sale, and that as the county court judge had not considered this, the case must go back to him for a new trial.

As we are bound by the two decisions in *Trollope (George) & Sons* v. *Martyn Bros.* (1) and *Trollope (George) & Sons* v. *Caplan* (2), I think that the questions we have to consider are: (1) Did the defendants agree to pay the plaintiff £10,000 if he found a purchaser for the theatres at the price of £175,000? (2) Did the plaintiff find a purchaser who offered, "subject to contract," so to purchase them? (3) Did the defendants, after receiving this offer, break off negotiations? (4) Had the defendants a just or reasonable cause, or just excuse, for so doing? (5) If all these questions are answered in favour of the plaintiff, what should be his damages?

The first question arises because counsel for the defendants says that, while the plaintiff avows that the alleged agreement was made with him by Garton, the solicitor to the defendants, he has not proved that Garton had any authority so to agree. BRANSON, J., decided this in the plaintiff's favour. It is enough to say that I agree with him. The second and third questions must clearly be answered in favour of the plaintiff. As to the fourth question, counsel for the defendants strenuously argued that the defendants had just or reasonable cause or excuse. In the first place, he said that the defendants received a better offer from another purchaser direct, and that a vendor who has employed an agent, even stipulating that he is to be his sole agent, may always sell to someone direct without breaking any express or implied agreement with the agent, and that, as they sold elsewhere at a better price, they clearly had just cause. I think this contention fails on the facts. The defendants did not sell the freehold and leasehold theatres at all. So far as I know, they still own them. What happened was that the shareholders in the defendant companies sold their shares to a purchasing company for £175,000. The assets of the defendant companies, the theatres, were not sold to anyone, however. Counsel for the defendants says that, from the point of view of the shareholders, this achieved a better result. They got £175,000, whereas, if the plaintiff's clients had bought the theatres, on the companies being wound up, they would have got only £175,000, less the costs of liquidation, and the like. The shareholders, however, are not the company. The fact remains that the defendant companies refused to go on with the negotiations for the sale to the plaintiff's friends because they decided not to sell at all.

Then it was contended that the defendants had just cause or excuse because one of the defendant companies, Regal (Hastings), Ltd., received a solicitors' letter, dated Oct. 3, 1935, threatening action against the company if they went on with this proposed sale. It was the Regal company who had the two leasehold theatres as well as one of the freeholds. They had not paid any premium for these leases. On Sept. 27, 1935, the directors of Regal (Hastings), Ltd., formed a subsidiary company to which they assigned these leases. The directors, or some of them, took 3,000 shares in this subsidiary company, and the Regal company had 2,000 shares. In their negotiations with the plaintiff's clients, as appears by a letter dated Oct. 21, the directors of the two companies asked that the £175,000 price should be allocated so as to apportion £15,000 as the price of the two leasholds. The result would be that, on the winding up of the subsidiary company, the directors, *qua* shareholders in it, would get three-fifths of the £15,000 and the Regal company only two-fifths. Thus the directors would get £9,000 for their £3,000-worth of shares in the subsidiary company, and the Regal company, who had owned the leaseholds, and its shareholders in its winding up, would get only £6,000. It was this scandalous manœuvre that upset the principal shareholder in Regal, on whose behalf the solicitors wrote the letter dated Oct. 3. In these circumstances, I do not think that the receipt of that letter, prompted by this action of the defendant companies' directors, afforded the defendants just cause or excuse for refusing to continue the negotiations.

Then we come to the fifth question. On the question of damages, the question seems to be, what were the odds in favour of the negotiations ending in a completed sale, if the defendants had carried them on? I have considered this matter carefully. I agree that the chances in favour of a successful ending were such that the plaintiff should be awarded £8,000.

Counsel for the defendants took one further point on their behalf. Garton for the defendants originally asked Ewbank to find a purchaser. Ewbank enlisted the services of the plaintiff, and, subsequently, by a letter dated Oct. 2, stipulated that the commission of £10,000 should be promised to the plaintiff. This was done by Garton's letter to Ewbank, dated Oct. 11, and, as appears by a letter dated Oct. 12, the plaintiff had agreed that, on receiving the £10,000, he would give £4,000 of it to Ewbank. Now, Ewbank was auditor to the two defendant companies. Counsel for the defendants says that it was illegal for the auditor to do any other work for the companies and receive payment, and that, therefore, this claim by the plaintiff is upon an illegal and unenforceable contract.

I think that there is nothing in this contention. An auditor, *qua* auditor, no doubt owes certain duties to the company, but to suggest that the company cannot lawfully employ him to do any service for them quite outside his duties as auditor seems to me unfounded. If, for example, the company employed the accountant, who happened to be their auditor, to go abroad and settle some disputed matters, and subsequently refused to pay his reasonable charges for that work, I cannot believe that they could successfully defend an action for those charges.

Lastly, I should perhaps mention that counsel for the defendants formally submitted that the dissentient judgment of Scrutton, L.J., in *Trollope (George) & Sons* v. *Martyn Bros.* (1) was to be preferred to those of Greer and Maugham, L.JJ., but that question, however fit it may be (as Greene, L.J., said in *Trollope (George) & Sons* v. *Caplan* (2)) for examination elsewhere, is not one for us. I think that the appeal should be allowed and judgment entered for the plaintiff for £8,000 with costs here and below.

du Parcq, L.J. [read by MacKinnon, L.J.]: I have come to the same conclusion as Scott and MacKinnon, L.JJ., as to the order which this court should make, for substantially the same reasons. I desire to add some words of my own, first, on the question whether or not the defendants have broken the implied term of their contract with the plaintiff, and, secondly, as to the measure of damages.

In my opinion, Branson, J., was right in holding, as he did, that the words " on completion of the sale " contained in the letter of Oct. 11, 1935, which purports to confirm the contract sued on, did in fact form part of that contract. Thus the agreement was to pay commission to the plaintiff " on completion of the sale " of the properties mentioned to a purchaser introduced by the plaintiff at a price named. The sale has not been completed, so that, according to the express terms of the contract, the commission is not payable. It has been settled law for a long time—certainly since *Prickett* v. *Badger* (7)—that a would-be vendor who makes such a contract with an agent will not escape liability to the agent if it turns out that he has no interest in the land and so cannot sell. Although *Prickett* v. *Badger* (7) was not decided on the doctrine of an implied term, there is no difficulty about implying in such a contract with an agent a warranty by the principal that he is in a position to sell. Nor is it difficult to see that a term ought to be implied that the principal will not break a contract entered into with the purchaser introduced, and so be guilty of a wrongful act. In the present case, there is no doubt about the defendants' capacity to sell, and it is clear that they have not broken any contract with the proposed purchasers. As the law stands, however, it is established that a term must be implied in the contract with the agent that, given a ready and willing purchaser, the principal will not withdraw from the transaction " without reasonable cause " or " without just excuse." So far as the principal's relations with the

proposed purchaser are concerned, he needs no excuse, just or unjust, for withdrawing from the transaction, and I confess that I find great difficulty in coming to a conclusion as to the kind of excuse which ought to be considered just and reasonable as between principal and agent. It is plain on the authority of *Trollope (George) & Sons* v. *Martyn Bros.* (1), which we are, of course, bound to follow, that an arbitrary decision to A
break off the negotiations—in other words, a capricious change of mind—is not a reasonable cause. Whether the question of what is a reasonable cause is in each case one of fact (to be left to the jury, if there is one) or whether there must be taken to be some guiding principle of law which has not yet been clearly formulated is, I think, left in doubt by the B
decisions. In a case like the present, where the purchase price is named in the contract of agency, and only one agent is employed, I think it may well be impossible to draw a line anywhere short of saying that there is to be implied a term that, so long as the purchaser introduced (who I assume satisfies all the express terms of the agency agreement) remains C
ready and willing to complete at the named price, the principal will not withdraw from the transaction. However that may be, there must, I think, be included in the implied term a promise by the principal that he will not cause the negotiations to break down by insisting on any unusual terms or covenants in the contract or conveyance, and this D
point is material when the damages come to be assessed. It is not necessary in this case to attempt the difficult task of defining "reasonable cause" with precision, and I am content to say that, for the reasons given by the other members of the court, the excuse put forward by the defendants does not commend itself to me, or appear to me to be any E
more just or reasonable than an arbitrary and capricious withdrawal would have been. Having said this much, I would add that I heartily agree with what was said by GREENE, L.J., in *Trollope (George) & Sons* v. *Caplan* (2) when he expressed the hope that one day the whole position might be reviewed by the House of Lords. F

As for damages, if it were clearly established that, but for the withdrawal of the defendants, the contract with the prospective purchaser would certainly have been completed, I should have had no doubt that the plaintiff should recover the whole of the agreed commission. Where the payment of an agreed sum is made to depend on the fulfilment of a G
condition, and the party who is bound to pay has it in his sole power to prevent the condition from being fulfilled, it is clear that, if he does wrongfully prevent its fulfilment, he will be just as much liable as if it had been fulfilled. In the present case, however, even if the defendants had not withdrawn from the transaction, it does not follow, and it was H
not proved, that the proposed purchasers would certainly have completed. They were not bound to complete, and the negotiations might have broken down. What the plaintiff has lost through the defendants' breach of the implied term in their contract with him is his chance (no doubt a good one) of earning the agreed commission. It is difficult to assess its

value, but, for myself, I am content to accept the estimate arrived at by SCOTT and MACKINNON, L.JJ., and to agree that judgment should be entered for the plaintiff for the sum of £8,000.

Appeal allowed. Judgment for the plaintiff for £8,000 with costs in both courts. Leave to appeal to the House of Lords.

A Solicitors: *Mayo, Elder & Co.* (for the appellant); *H. S. Wright & Webb* (for the respondents).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

B

HALIFAX BUILDING SOCIETY *v.* SALISBURY.

[COURT OF APPEAL (Slesser and Luxmoore, L.JJ., and Atkinson, J.). **November 8, 9, 14, 15, December 4, 1939.**]

C *Building Societies—Advances—Security upon which advances can be made—Mortgage of freeholds—Collateral charge on fund—Pool agreement—Validity—Misrepresentation—Building Societies Act,* 1874 (*c.* 42), *s.* 13.

The plaintiffs, a building society incorporated under the Building Society Acts, had advanced money on mortgage to the defendant in the usual way for the purchase of a house. The advance amounted to 95 per cent. of the value of the house and land, and, in so far as it D exceeded 75 per cent. of that value (the usual limit of the society's advances), was further secured by a pool agreement whereby the builders personally guaranteed the excess of the advance and charged a fund with the payment of such excess. Appended to a letter stating that the society would make the advance were the words "Security: one freehold dwelling-house: Advance: £452 8*s*." The E mortgage recited that the loan was to be secured in manner thereinafter appearing, and no reference to the pool agreement was made in the operative part of the mortgage. It was contended that this advance was an advance upon a security other than land, and, therefore, that the mortgage was invalid as being in excess of the building society's statutory powers. It was also contended that the advance had been procured by misrepresentation:—

F HELD: (i) the mortgage was not *ultra vires* the society.

(ii) there was no false representation inducing the defendant to enter into the mortgage.

[**EDITORIAL NOTE.** The pool agreement was before a court of first instance in the recent case of *Bradford Third Equitable Benefit Building Society* v. *Borders* (3), and to some extent this case, upon the first point, might be considered to be an G appeal from that decision, but it is understood that that decision will be before the Court of Appeal shortly. The decision herein in effect confirms the decision in the earlier case, and is not limited, as was the decision in the earlier case, to the transaction between the society and the mortgagee, since any question as to the validity of the pooling agreement itself has been settled by the recent Building Societies Act, 1939.

H AS TO STATUTORY REGULATION OF BUILDING SOCIETY MORTGAGES, see HALSBURY, Hailsham Edn., Vol. 3, pp. 410, 411, paras. 775-777; and FOR CASES, see DIGEST, Vol. 7, pp. 472, 473, Nos. 112-116.]

Cases referred to:

(1) *Sheffield & South Yorkshire Permanent Building Society* v. *Aizlewood* (1889). **44 Ch.D. 412; 7 Digest 461, *37*; 59 L.J.Ch. 34; 62 L.T. 678.**

(2) *Cullerne* v. *London & Suburban General Permanent Building Society* (1890), 25 Q.B.D. 485; 7 Digest 461, *38*; 59 L.J.Q.B. 525; 63 L.T. 511.

(3) *Bradford Third Equitable Benefit Building Society* v. *Borders*, [1939] Ch. 520; [1939] 1 All E.R. 481; Digest Supp.; 108 L.J.Ch. 171; 160 L.T. 456.

(4) *Wenlock* (*Baroness*) v. *River Dee Co.* (1883), 36 Ch.D. 675, n.; 13 Digest 367, *1002*; 57 L.T. 402, n.; *affd.* (1885), 10 App. Cas. 354; *subsequent* A *proceedings* (1887), 19 Q.B.D. 155; (1887), 36 Ch.D. 674; *affd.* (1888), 38 Ch.D. 534.

(5) *A.-G.* v. *Great Eastern Ry. Co.* (1880), 5 App. Cas. 473; 13 Digest 367, *998*, 49 L.J.Ch. 545; 42 L.T. 810.

(6) *Inland Revenue Comrs.* v. *Westminster* (*Duke*), [1936] A.C. 1; Digest Supp.; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490. B

(7) *Re Coltman, Coltman* v. *Coltman* (1881), 19 Ch.D. 64; 25 Digest 317, *204*; 51 L.J.Ch. 3; 45 L.T. 392.

(8) *Angus* v. *Clifford*, [1891] 2 Ch. 449; 35 Digest 54, *488*; 60 L.J.Ch. 443; 65 L.T. 274.

(9) *Nocton* v. *Ashburton* (*Lord*), [1914] A.C. 932; 35 Digest 55, *493*; 83 L.J.Ch. 784; 111 L.T. 641. C

(10) *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87; 12 Digest 254, *2079*; 79 L.J.Ch. 87; 101 L.T. 787.

(11) *Murray* v. *Scott, Agnew* v. *Murray, Brimelow* v. *Murray* (1884), 9 App. Cas. 519; 7 Digest 455, *5*; 53 L.J.Ch. 745; 51 L.T. 462; *varying* S.C. *sub nom. Re Guardian Permanent Benefit Building Society* (1882), 23 Ch.D. 440.

(12) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; 35 Digest 40, *338*; 1 L.J.K.B. 92. D

(13) *Smith* v. *Chadwick* (1884), 9 App. Cas. 187; 35 Digest 18, *106*; 53 L.J.Ch. 873; 50 L.T. 697.

(14) *Yorkshire Railway Wagon Co.* v. *Maclure* (1882), 21 Ch.D. 309; 26 Digest 17, *54*; 51 L.J.Ch. 857; 47 L.T. 290.

(15) *A.-G.* v. *Smethwick Corpn.*, [1932] 1 Ch. 562; Digest Supp.; 101 L.J.Ch. 137; 146 L.T. 480. E

(16) *Hayes Bridge Estate* v. *Portman Building Society*, [1936] 2 All E.R. 1400; Digest Supp.

(17) *Ayers* v. *South Australian Banking Co.* (1871), L.R. 3 P.C. 548; 7 Moo.P.C.C. 432; Digest Supp.; *sub nom. Ayres* v. *South Australian Banking Co.*, 40 L.J.P.C. 22.

(18) *Taylor* v. *Chichester & Midhurst Ry. Co.* (*Directors, etc.*) (1867), L.R. 2 F Exch. 356; 13 Digest 356, *929*; 36 L.J.Ex. 201; 16 L.T. 703; *revsd. on other grounds* (1870), L.R. 4 H.L. 628.

(19) *Clark* v. *Smith*, [1939] 4 All E.R. 59; Digest Supp.

(20) *Cope* v. *Rowlands* (1836), 2 M. & W. 149; 12 Digest 273, *2232*; 6 L.J.Ex. 63.

(21) *East Anglian Rys. Co.* v. *Eastern Counties Ry. Co.* (1851), 11 C.B. 775; 13 Digest 368, *1004*; 21 L.J.C.P. 23; 18 L.T.O.S. 138. G

(22) *Re Mahmoud & Ispahani*, [1921] 2 K.B. 716; 12 Digest 271, *2220*; 90 L.J.K.B. 821; 125 L.T. 161.

APPEAL by the defendant from an order of His Honour JUDGE DRUCQUER, sitting in the Brentford County Court, dated June 12, 1939. The facts are fully set out in the judgment of SLESSER, L.J. H

D. N. Pritt, K.C., and *R. H. T. Whitty* for the appellant.

A. T. Denning, K.C., and *Helenus P. J. Milmo* for the respondents.

Pritt, K.C.: There was ample evidence on which the judge could find the respondents guilty of fraud. His summing up contained all the ingredients of fraud, and he misdirected himself in law in holding that there was no fraud because the respondents made their misrepresentation from a good motive: *Polhill* v. *Walter* (12). Under the Building Societies Act, 1874, s. 13, a building society may lend on real security. This society lent part of the loan on the security of a builder's guarantee, which was a breach of the statute. The court must look at the substance of the matter. Otherwise a purely nominal transaction would be permissible.

Denning, K.C.: There was no misrepresentation at all. The words "Security: one freehold dwelling-house" were not a representation that the house was the sole security, or by itself sufficient security. At most, this statement was ambiguous, and there was no evidence that the society or the plaintiff understood it in the sense alleged, or that the plaintiff acted on it. He had bound himself to the builders long before the statement was made. [Counsel referred to *Smith* v. *Chadwick* (13), and on this point was stopped by the court]. The substance of the transaction is to be found only by looking at the deeds themselves: *Inland Revenue Comrs.* v. *Westminster* (*Duke*) (6) and *Yorkshire Railway Wagon Co.* v. *Maclure* (14). On these deeds, the society lent £452 on the security of a freehold house, and took collateral security from the builders. The question is whether the transaction was within the powers conferred by the statute, or fairly incidental to or consequential upon those powers: *A.-G.* v. *Great Eastern Ry. Co.* (5) and *A.-G.* v. *Smethwick Corpn.* (15). The taking of collateral security is fairly incidental to the taking of primary security. The legislature have recognised this principle in the Housing Act, 1925, s. 92, and the Housing Act, 1933, s. 2. Those Acts assume that to take collateral security is within the powers of a building society, and the courts have taken the same view: *Sheffield & South Yorkshire Permanent Building Society* v. *Aizlewood* (1), *Hayes Bridge Estate* v. *Portman Building Society* (16), and *Bradford Third Equitable Benefit Building Society* v. *Borders* (3). The Building Societies Act, 1939, s. 1, is declaratory of the position, and, notwithstanding sect. 17, can be considered in this case. Even if the transaction was *ultra vires*, it was not illegal. It was only unauthorised. The authorities show that in such a case the mortgage is good: *Ayers* v. *South Australian Banking Co.* (17). The society can sue a third person on the unauthorised transaction so long as this is not illegal: STREET ON ULTRA VIRES, pp. 30-80, and BRICE ON ULTRA VIRES, 3rd Edn., pp. 653, 655, 701. [Counsel referred to *Taylor* v. *Chichester & Midhurst Ry. Co.* (*Directors, etc.*) (18), *Re Coltman, Coltman* v. *Coltman* (7), *Hayes Bridge Estate* v. *Portman Building Society* (16) and *Clark* v. *Smith* (19).]

Whitty, in reply: An act may be made illegal by implication: *Cope* v. *Rowlands* (20), *East Anglian Rys. Co.* v. *Eastern Counties Ry. Co.* (21) and *Re Mahmoud & Ispahani* (22). Where an act is *ultra vires*, only the corporation can raise the point: STREET ON ULTRA VIRES, p. 30. By the authorities, where an act done by trustees is beyond their authority, but all the beneficiaries ratify it, then, if a beneficiary wishes to object to it, he can do so only under the exclusive equitable jurisdiction, and his remedy may be barred by various equitable rules: *Taylor* v. *Chichester & Midhurst Ry. Co.* (*Directors, etc.*) (18).

Slesser, L.J.: In this case, the plaintiffs, a building society incorporated under the Building Societies Act, claim possession of a house A and land in Feltham, Middlesex, the property of the defendant, under a mortgage to them of Sept. 29, 1933, whereby the defendant, as mortgagor, among other matters, under cl. 9 attorned tenant to the plaintiffs at a nominal rent. The defendant, who had taken shares in the society as a condition of an advance to him, failed to pay £40 2*s*, being subscrip- B tions and fines covenanted to be paid under the mortgage, and on July 5, 1937, he was given one week's notice to quit the premises. This sum of £40 2*s.* is claimed in this action.

Subject to a defence of fraudulent misrepresentation, by which the defendant alleged that he was induced to enter into the mortgage, the C defendant's case is that in law the mortgage is void, and cannot be relied upon for any purpose by the plaintiffs, as being forbidden by the Building Societies Act, 1874, s. 13, and he counterclaims for a declaration that the mortgage is void. At the hearing, other defences were considered by the judge and negatived, and the defendant on this appeal concedes D that he must fail unless he can establish that the mortgage is void, or that he was induced to enter into it by fraudulent misrepresentation.

The Building Societies Act, 1874, s. 13, provides as follows:

> Any number of persons may establish a society under this Act . . . for the purpose of raising by the subscriptions of the members a stock or fund for making E advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate, by way of mortgage . . .

Sect. 9 provides as follows:

> Every society now subsisting or hereafter established shall upon receiving a certificate of incorporation under the Act, become a body corporate.

F

Before 1874, no provision existed in the earlier Acts providing for the incorporation of such societies.

In my opinion, the terms of sect. 13, defining, as they do, the purposes for which the society may be established and incorporated, constitute a restrictive and limiting definition, and, on general principle, acts not G falling within the purposes there stated, or reasonably incidental thereto, would be beyond the powers of the society and void. In *Sheffield & South Yorkshire Permanent Building Society* v. *Aizlewood* (1), it was decided that for a building society to secure the advantage of an inexpensive mode of recovering what is due by means of a personal guarantee H of a third party, or by a charge on some readily available personal estate, was within the purposes of the building society as being incidental to the express power to make advances to members out of the funds of the society upon the security of freehold, copyhold or leasehold estate by way of mortgage, but, if the mortgage is secured otherwise than on the security of freehold, copyhold or leasehold estate at all, it is not valid: *Cullerne* v. *London & Suburban General Permanent Building Society* (2), per LINDLEY, L.J., at p. 488. These principles are sufficient, in my judgment, to determine the matters raised in the first defence.

The material facts are these. In May, 1933, the defendant negotiated A with certain builders, New Ideal Homesteads, Ltd., that they should sell to him a plot of land on a building estate known as the Hanworth Estate for £50, and build thereon a house for £425, a cost of £475 in all. On May 20, he signed contracts with the building company for the purchase of the land and the erection of the house. The same day, he B applied to the plaintiff building society for an advance upon the house, when constructed, of £452 8*s*. On Aug. 16, the plaintiffs' valuers assessed the property at £475. No suggestion is here made that this was not an honest valuation.

The small difference between the advance and the total cost of the C house and land—namely, 5 per cent. of the value—was to be paid to the builders by the defendant in cash. Thus, the application to the plaintiff society was for an advance amounting to 95 per cent. of the value of the house and land as found by their valuers, a considerable, and perhaps by itself a precarious, accommodation. In reality, unknown to the defendant, D the builders had agreed with the building society, in this case and in other cases on the estate, that the amount of the moneys advanced, not exceeding in the aggregate a sum equal to the difference between the sum advanced and 75 per cent. of the value of the house and land, should be secured collaterally by the personal guarantee of two of the E directors of the building company, and also that the building society should have a lien as security on a fund known as the "pool," composed of payments paid into it in respect of every second house upon the estate and mortgaged, and later on every third house, and subsequently on other revised terms until the pool reached a certain sum. This is part of F the normal procedure of such building societies, who are thus enabled with comparative safety to advance to the mortgagors far more than they would do without the collateral security of the builders. The evidence in this case, more particularly the plaintiff society's own agenda book, shows that their normal "lending limit," to quote their own G phraseology, is 75 per cent. of the value of such a house and no more. In substance, therefore, the collateral security in such a case as this has induced them, not only to lend 75 per cent., as apparently they would have been willing to do without it, but also to lend another 20 per cent. beyond that amount. The mortgage deed, which was entered H into on Sept. 29, 1938, contains no word which suggests that the advance is on any security other than that of freehold land. Indeed, it is stated in terms that the advance is upon the security of the property.

It is argued, however, for the defendant that, so far as the security is concerned, the entry in the mortgage deed is, by omission of the collateral security, *falsa demonstratio*, and it is argued that the court is entitled to go behind the words and ask whether in fact the plaintiffs, in making the advance, were not making it—at any rate, as to £98, 20 per cent. of the value—on security other than that of land. I agree that there may be cases where the advance is on a security merely nominal, or where the advance exceeds the value of the property, where it might be right to enter into such an inquiry, but the real question in the case is, A whatever may have been the inducement to the plaintiffs to make so large an advance on the security of the value, whether it was not nevertheless an advance secured upon the freehold, and that notwithstanding, as appears to be the case, that without the collateral security the plaintiffs would have advanced only up to 75 per cent. of the value. B

If it be right, as I think it is, to hold that a collateral security for a certain sum which the plaintiffs might otherwise have hesitated to advance upon the security of land alone will not prevent that advance, if made upon the security of land with collateral security (even though such collateral security be the deciding factor in inducing the mortgagee C to make the advance), being within their statutory powers, it is difficult to see why an advance of a sum beyond what the mortgagees would ordinarily lend because of a collateral security, limited in amount to the excess, is not equally an advance upon the security of the land, if, on the face of it, it purports to be such a security. The absence of knowledge D of the mortgagor of the collateral security seems to me immaterial in considering the validity of the advance as regards the statutory power. Of course, if the advance upon the security of the land is not as stated, but is a mere cloak to enable the advance to be made upon personal security, it might be otherwise. However, that is not this case. There E are some observations on this matter made *obiter* by Stirling, J., in *Sheffield & South Yorkshire Permanent Building Society* v. *Aizlewood* (1) which call for consideration. Speaking of what is beyond the powers of a society under sect. 13 of the 1874 Act, he says, at p. 451:

F

> . . . the propriety of the transaction is to be tested as if no such ingredient [of personal security] entered into it. If there be no freehold, copyhold, or leasehold estate comprised in the security, or if the estate so comprised be merely nominal, or its value out of all proportion to the amount advanced, the transaction is beyond the powers of the society, and invalid; but where, as here, the borrower offers as security such estate to a substantial extent, an advance is within the powers conferred by the Act of 1874, and the question for the officers of the society to determine is what amount may properly be advanced, and that question they must G decide having regard solely to the nature and value of the freehold, copyhold, or leasehold estate offered to them, and without reference to the solvency of the borrower or the worth of any personal estate he may be willing to throw in by way of security.

These words, if construed literally, might support the argument for the defendant here that, in considering what may properly be advanced, H the society did not have regard solely to the value of the freehold—if they had, it is clear from their own admission that they would not have advanced the last £98—but did consider what might be thrown in by way of security by the builders. However, such a test can only be properly applied, I think, as an element in considering whether the estate comprised is merely nominal, or whether its value is out of all proportion to the amount advanced. If it be taken to mean that the lender may not risk a greater advance on the security of the land than he would otherwise grant because of the collateral security, then respectfully I must comment that I can find nothing in sect. 13 of the 1874 Act which prevents an indulgent lender from lending up to the whole ascertained value of the land as sole security, nor to prevent a more hesitant lender from increasing his risk by reason of the presence of a further consideration—namely, a sufficient collateral security, again up to the full value, or any less amount. In this conclusion, I agree with the view expressed by BENNETT, J., in *Bradford Third Equitable Benefit Building Society* v. *Borders* (3). The fact that, unknown to the defendant, the plaintiff society took a collateral security, albeit limited in amount, to cover their very considerable advance to him on the security of his freehold does not make that advance any the less one expressly authorised by the statute. I conclude, therefore, that this advance and mortgage were within the powers of the society, and were valid.

I pass, therefore, to the other defence to the enforcement of the plaintiffs' rights—namely, the plea that the defendant was induced by false and fraudulent misrepresentation of the plaintiffs to enter into the mortgage instrument. The representation here relied on is said in the particulars of defence to have been made by letter dated Aug. 22, 1937, and to have been in truth and in fact false to the plaintiffs' knowledge, the representation being that the dwelling-house and land were a sufficient security for an advance of £452 8*s*., and were worth in fact £475.

The facts proved at the trial were that on May 26, 1933, the defendant signed a form in the form of answers to printed questions in which he stated that the land cost £50 and the liability to the builders on the building contract was £425. He asked for an advance of £452 8*s*., to be repaid in 20 years. The security offered was the land and house. On Aug. 22, after the valuation which I have mentioned, came the letter relied upon by the defendant:

> . . . the directors have granted to you [the defendant] the undermentioned advance subject to the title of the property offered as security being satisfactory and subject to the rules. Security: The freehold dwelling-house situate 71, Hounslow Road, Feltham, Middlesex: advance £452 8*s*. (five 8/10th shares) on the second C. Table, interest 5 per cent., term 18 years 10½ months, lunar monthly payments £2 18*s*.

The judge has held that this letter was a representation that the house was a sufficient security for the building society, but that the house was not. He says:

> In my opinion, the building society would never have advanced that amount upon the security of the house. It was only because of the fact that they had good collateral security for the excess that they made the advance they did. I think there is in this letter a representation that the security was sufficient for the advance. It certainly was not sufficient, and it was known perfectly well to the society that it was not a sufficient security. I think that, if they had put that in with the intention of concealing it from the mortgagor, I should consider that the defendant had succeeded in this case, but I do not think that there was any intention to defraud at all. I think that the building society advanced the money on what

> they believed to be the true value of the property—namely, £475—and that the only reason they did not make a show of the collateral security which they were obtaining was that they thought it might be detrimental to business, in that the mortgagor would become careless, because he would say to himself: "It is all right. If I do not pay this, they have other security." It was only £98, but that is the kind of thing which would get into the minds of some people who bought houses on estates of this kind, and for that reason it was not disclosed. I was inclined to think that there was a misrepresentation, but the collateral security was concealed for a good purpose, and not with the intention in any way of committing a fraud. In those circumstances, I do not think that the defendant is entitled to succeed.

In coming to this conclusion, the county court judge must be taken to have accepted the evidence of Bentley, the secretary of the society, that the society took the view that to inform the borrower about the collateral security might lead to slackness on his part. On this issue of deceit, the judge appears to have failed to give adequate consideration to the nature of the alleged representation of the society upon which reliance was placed. It will be remembered that on May 20, 1933, the defendant applied for an advance of £452 8*s*., and stated that the cost of the house and land would be £475. He asked, therefore, for an advance of 95 per cent. of the cost, stating that the security would be the house and land. In fact, on Aug. 16, the plaintiffs' valuers stated the house to be worth £475, and on Aug. 22 the society wrote the letter said to contain the fraudulent representation, in which they stated that the security would be the house and land. That statement in fact was but a repetition of the security stated by the applicant himself. True it is that they did not tell him that they had collaterally secured themselves by the builders' guarantees and lien, and for the reason, as the judge finds, that they feared it might have the effect of making the defendant less punctual with his payments, but how the omission of a reference to the collateral security could amount to a false representation to the defendant that the security which he offered was sufficient, or not worth in fact £475, I cannot appreciate. No false representation appears to me to have been made at all. There was merely an acceptance of the defendant's own statement.

Moreover, even if the statement of the security in the letter of Aug. 22 could be taken to be a false representation, I am unable to see in what way it can be said to have induced the defendant to act to his detriment. He had already agreed to buy the house and land for £475. He knew that the valuers had put that value upon the property, and he had applied to the plaintiff society for accommodation. The defendant alleges that this representation was to the effect that the house and land were a sufficient security for the advance of £452 8*s*., and that they were worth at least £475. The defendant had already agreed to pay the builders that sum, and it had no relation to his request for an advance. Nor can it possibly be said that, when he agreed to pay the builders £475, he relied upon any representation by the plaintiff society. As to the £452 8*s*., if it be assumed that he was led to believe by the plaintiff society that the house and land were sufficient security for that sum, in what way can it be said that he was induced to alter his position by taking an advance of that sum ? Can it be argued that, if he had known the full facts, he would have refused the 95 per cent. advance ? There is no suggestion in the evidence to that effect.

The relevant evidence of the defendant on this head is as follows :

> A I heard about the collateral security for the first time in 1936. It amazed me. I wondered why they advanced so much money on such property. I concluded I had been caught. I did not know they were not lending everything apart from the deposit.

In cross-examination, he said :

> B I should have been told the house was not worth the money. I still consider there is fraud.

If this means anything, it is a complaint that the true value of the house was misrepresented to him. That, however, was a matter between him and the builders. He may well have thought that the plaintiff society C were lending everything apart from the deposit, but there is no suggestion of conspiracy between them and the builders, and his liability to the builders was quite irrespective of his liability to the plaintiff society. For all these reasons, the defence founded upon deceit also fails. In my opinion, there was no false representation (even by omission) made D to him by the plaintiff society, and, if there were, there is no evidence that he was induced by it in any way to alter his position to his detriment, or at all. In the result, this appeal fails, and must be dismissed with costs.

E LUXMOORE, L.J. [read by SLESSER, L.J.] : The Halifax Building Society (hereinafter called "the society") instituted proceedings in Mar., 1938, in the Brentford County Court against Salisbury, a member of the society, for possession of a house formerly known as No. 71, Finchley Road, Feltham, but now known as No. 205, Hounslow Road, F and for the sum of £40 2*s*. for arrears of subscriptions and fines. The basis of the claim was a mortgage, dated Sept. 29, 1933, under which the society advanced to Salisbury the sum of £452 8*s*. upon the security of the house in question. The mortgage contained a provision under which Salisbury attorned tenant of the house to the society. The society G claimed that it had terminated this tenancy by notice to quit, dated July 15, 1937. Salisbury put forward a number of defences. I need refer to only two of these. They are, first, that he was induced to enter into the mortgage by the fraudulent misrepresentations of the society, and, secondly, that the mortgage was *ultra vires* the society, because it H was in breach of the Building Societies Act, 1874, s. 13, and was, therefore, unenforceable and void. It was further suggested that the mortgage was *ultra vires* the rules of the society, but I need not deal with this, because the rules cannot carry the case beyond the provisions of the section. By way of counterclaim, Salisbury sought to recover damages against the society for the alleged fraudulent misrepresentations, and claimed a declaration that the mortgage was void, an order for its delivery up for cancellation, repayment to him by the society of a sum of £132 4*s*. 6*d*. paid by him to the society under the mortgage, and an injunction to restrain the society from lending money otherwise than upon the freehold or leasehold property on the security of which such advances purport to be made, or from advancing upon the security of any premises in excess of those for which, in the *bona fide* opinion of the directors of the society, such premises are sufficient security. The society denied that any representations made by it were false or fraudulent to the knowledge of the society, or that Salisbury was induced to enter into the mortgage by the alleged representations, or any of them. The society also denied that the mortgage was either *ultra vires* or unenforceable. The action was heard by His Honour Judge Drucquer on June 12, 1939. After a prolonged hearing, the judge gave judgment for the society for possession and for the sum of £40 2*s*. and costs, and dismissed the counterclaim with costs. Salisbury appeals against the order for possession and for payment of the £40 2*s*., and asks that the society's claim may be dismissed. On the counterclaim, he asks for judgment for the sum of £87 by way of damages in respect of the alleged fraudulent misrepresentations, for a declaration that the mortgage is *ultra vires* and void, and for its delivery up for cancellation, as well as for an order for the repayment to him by the society of the sum of £132 4*s*. 6*d*. No relief is now asked by way of injunction.

As I have already said, there are two main questions to be considered. Each is separate and distinct from the other. Logically, the first point to be determined is whether the mortgage executed by Salisbury in favour of the society is *ultra vires*, and, therefore, unenforceable or void. If this question should be decided in favour of Salisbury, the question of misrepresentation and the relief based thereon would become of academic interest only, for counsel for the appellant admitted that, if he succeeded on this ground, any claim to damages in respect of the alleged misrepresentations would be merged in the relief obtained by reason of the cancellation of the mortgage. I will therefore deal first with the question whether or not the mortgage is *ultra vires*. Its solution is said to depend on a determination of what is the true construction of the Building Societies Act, 1874, s. 13. Before I refer to the Act, it is necessary to state the facts material to be considered. On May 26, 1933, Salisbury entered into two agreements with a company called New Ideal Homesteads, Ltd. (hereinafter called "the builders"), one being for the purchase for the sum of £50 of a plot of land on the Hanworth Park Estate, which was being developed as a building estate by the builders, and the other for the erection by the builders of a house on that plot for the sum of £425. The total cost to Salisbury of the house and land was £475. It was a term of the arrangements between the builders and Salisbury that he should make a small cash payment and that the balance of the purchase price should be obtained from the society on a mortgage of the house and land for the sum of £452 8*s*., repayable by monthly instalments in accordance with the rules of the society. The builders were enabled to offer these terms because they had already made an arrangement with the society that, in the case of every mortgage effected by the society in respect of houses on the Hanworth Park Estate where the amount secured was equal to 95 per cent. of the value of the house and land mortgaged, the amount of the moneys advanced, not exceeding in the aggregate a sum equal to the difference between the sum actually advanced and 75 per cent. of the value of the house and land mortgaged, should be collaterally secured by the personal guarantee of two men name Shepherd and Meyer, who were directors of the builders, together with a charge on a fund referred to in these proceedings as "the pool," which was built up and fed by cash payments which decreased as the total amount in the pool increased. When the pool was started, £20 was paid into it in respect of every second house upon the estate mortgaged to the society. This was subsequently reduced to a like payment in respect of every third house, until the pool reached £5,000. Then payments into it were further reduced to the payment of the like deposit in respect of every fourth house. This was subsequently further reduced to a payment into the pool in respect of every fifth house. The mortgage in question was entered into on Sept. 29, 1933. It is expressed to be made between Salisbury, who is described as a member of the society, of the one part and the society of the other part. The mortgage contains a recital that Salisbury had applied to the society for an advance of £452 8*s*., being the amount to which he was entitled according to the rules of the society in respect of five $\frac{8}{10}$ shares held by him in the society, and that the society had agreed to advance that sum upon having the repayment of combined principal and interest thereon secured in manner thereinafter appearing. By cl. 2, it was stated that the sum of £452 8*s*. was advanced upon the terms of the society's second C Table, under which no profits are allowed in respect of the sum per share advance, and the sum advanced is repayable in 18 years $10\frac{1}{2}$ months, to be computed from the monthly subscription meeting next preceding Sept. 29, 1933, by payments of 10*s*. every month for each share, such payments to be made at the monthly subscription meetings. These meetings are defined by the rules of the society, but I need not pause to explain what that definition is. By cl. 3, Salisbury covenanted to pay the prescribed monthly payments on the appropriate days, together with such fines, fees and other moneys as might become payable by him to the society under its rules in respect of the shares for the time being held by him. By cl. 4, Salisbury demised the house and land to the society for the term of 3,000 years from the date of the mortgage, subject to a proviso for cesser of the term upon payment of all moneys payable for the redemption of the mortgaged property in accordance with the rules of the society and the covenants entered into by him in the mortgage. I need not refer to any of the other provisions of the mortgage. It is sufficient to state that there is no reference in the deed to any collateral security, whether arising by reason of the guarantee given by Shepherd and Meyer or by reason of the charge on the pool.

If one looks at the mortgage deed alone, it appears to be a simple mortgage in one of the common forms usually adopted by building societies to secure the repayment of a loan with interest thereon by monthly instalments secured by a demise for the usual term of 3,000 years of freehold property. There is certainly nothing on the face of it to suggest that it is, or might be, *ultra vires* the society, or that it is, or might be, unenforceable. It is said, however, that it is *ultra vires* owing to the existence of the collateral security provided in accordance with the arrangement to which I have referred. This collateral security was afforded under a deed dated Sept. 29, 1933, and made between Shepherd and Meyer of the one part and the society of the other part. It secured what are therein defined as " the excess advances "—namely, the sum of £98, part of the £452 8*s.* advanced to Salisbury at the request of Shepherd and Meyer in excess of the normal lending limit of the society, which was stated in evidence to be £355, together with interest on the said sum of £98 at the rate specified in the mortgage of Sept. 29, 1933, from the date therein specified.

The argument is that, because the normal practice of the society was to advance not more than three-quarters of the value of any property charged to it in the absence of collateral security, the mortgage in the present case must in substance be treated as if the amount in excess of 75 per cent. of the value of the property had been advanced on the security of the personal guarantee and charged on the pool, and not upon the security of the property mortgaged. The Building Societies Act, 1874, s. 13, provides as follows:

> Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate, by way of mortgage; and any society under this Act shall, so far as is necessary for the said purpose, have power to hold land with the right of foreclosure, and may from time to time raise funds by the issue of shares of one or more denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purposes of the society. Provided always, that any land to which any such society may become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption, shall as soon afterwards as may be conveniently practicable be sold or converted into money.

If one is to arrive at a proper conclusion as to the meaning of this section, it is necessary to understand with what object the Act was passed. Building societies had been in existence for many years before 1874. The earliest Act relating to them was passed in 1836. Its title is " An Act for the regulation of Benefit Building Societies." The first recital in the preamble to the Act is not without interest in the present case:

> Whereas certain societies commonly called building societies have been established

> in different parts of the kingdom principally amongst the industrious classes for the purpose of raising by small periodical subscriptions a fund to assist the members thereof in obtaining a small freehold or leasehold property, and it is expedient to afford encouragement and protection to such societies and the property obtained therewith. . . .

The Act provides (to quote the side note in the King's Printers' copy A of the Act) that societies may be established for the purchase and erection of dwelling-houses. This is to be accomplished by raising by monthly or other subscriptions of members of the society:

> . . . a stock or fund for the purpose of enabling each member thereof to receive out of the funds of such society the amount or value of his or her share or shares therein, to erect or purchase one or more dwelling-house or dwelling-houses, or other B real or leasehold estate to be secured by way of mortgage to such society until the amount or value of his or her shares shall have been fully repaid to such society with the interest thereon, and all fines or other payments incurred in respect thereof. . . .

There is no provision limiting the amount to be advanced to any defined proportion of the purchase price or value of the property to be charged, C nor is there any express prohibition against the giving by, or taking from, the mortgagor or any other person of collateral security for the moneys advanced to the member, whether the nature of the collateral security be real, chattel real, or purely personal. Sect. 4 of the 1836 Act incorporates the provisions of the Friendly Societies Act, 1829, D and the Friendly Societies Act, 1834, so far as the same or any part thereof might be applicable to the purpose of any benefit building society and to the framing, certifying, enrolling or altering the rules thereof:

> . . . in such and the same manner as if the provisions of the said Acts had been E herein expressly re-enacted.

There is no provision for the incorporation of building societies in the 1836 Act.

The Building Societies Act, 1874, is intituled "An Act to consolidate and amend the laws relating to Building Societies." By sect. 7 of this F Act, the 1836 Act was repealed, but the section expressly provides that the repeal shall not affect any subsisting society certified under the 1836 Act until such society should have obtained a certificate of incorporation under the 1874 Act. Sect. 9 provides as follows:

> G Every society now subsisting or hereafter established shall, upon receiving a certificate of incorporation under this Act, become a body corporate by its registered name, having perpetual succession, until terminated or dissolved in manner herein provided, and a common seal.

The society was incorporated under the 1874 Act. Sect. 13, to which I have already referred in full, states the purpose for which building H societies may be established. The words are not the same as those set out in the recital in the preamble of the 1836 Act already quoted, but in substance they show that the object of a building society under the 1874 Act was similar to the object recited in the earlier Act—namely, the setting up of a fund from subscriptions by members for the purpose of making advances to members on the security of freehold, leasehold or copyhold property. It is to be observed that the object, so far as advances are concerned, is limited to advances made to members, and there is no power in the section to advance the society's moneys on mortgage to persons other than members.

The 1874 Act contains in sect. 16 provisions with regard to the rules of a building society. The matters to be dealt with include the purposes to which the funds of such a society are to be applied and the manner in which they are to be invested, while sect. 25 provides for the investment of moneys of a building society not immediately required for its purposes. The classes of investment authorised do not include mortgages or charges upon pure personalty. The 1874 Act, like the 1836 Act, contains no provision limiting the amount to be advanced by a building society to one of its members to any definite proportion of the purchase price paid for, or the value of, the mortgaged property, nor is there any express provision prohibiting the giving by, or taking from, the mortgagor or any other person of collateral security for moneys advanced, whatever the nature of such collateral security may be. The object of the 1874 Act seems to have been to provide for the incorporation of building societies and the regulation of their business. Clause 13 defines such objects of the building society as would be expected to be found in the memorandum of association of a limited liability company if the building society were so constituted, while the rules to be framed under sect. 16 of the 1874 Act seem to correspond to the provisions usually to be found in the articles of association of such a company. It seems to me that, in considering the scope of the objects of a building society under sect. 13 of the 1874 Act, it is permissible to include in those objects all such powers as are not expressly prohibited, but can reasonably be said to be ancillary to the primary object. It was laid down in *Wenlock* (*Baroness*) v. *River Dee Co.* (4), *per* LORD WATSON, at p. 362:

> Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

In addition to this, I would refer to what was said by LORD SELBORNE, L.C., in *A.-G.* v. *Great Eastern Ry. Co.* (5), at p. 478:

> . . . whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction to be *ultra vires*.

There are many cases to the same effect. Apart from any express prohibition, there is nothing illegal in taking collateral security for a mortgage, and there can be little doubt but that, by taking such security, the primary object of a building society—namely, to lend to its members money on the security of land and houses, whatever be the tenure, for the purpose of enabling them to purchase such land or houses, or to

build houses—may in all probability better be achieved. If this be so, the taking of such security would certainly appear properly to be ancillary to the primary object. In the absence of express authority to the contrary, on this aspect of the case I should have no hesitation in holding that the taking of collateral security in support of a mortgage
A to a building society is not *ultra vires* the society. It is not uninteresting to observe that the legislature appears to have recognised that a building society incorporated under the Building Societies Acts may take collateral security in support of a mortgage to any of its members. This recognition is to be found in the Housing Act, 1925, s. 92 (*b*), which empowers
B local authorities to guarantee repayment to a building society incorporated under the Building Societies Acts, 1874 to 1894, of advances made by the society to any of its members for the purpose of enabling them to build or acquire houses. It is also to be found in the Housing (Financial Provisions) Act, 1933, s. 2, which empowers the Minister of
C Health to reimburse to a local authority part of the losses sustained by it under guarantees given to building societies under the section of the 1925 Act to which I have just referred. Of course, if the taking of collateral security for, or its inclusion in a mortgage by, a member of a building society is made in such circumstances that, having regard
D to the nature and value of the security comprised therein, with reference to the value of the real or chattel real security, it could be demonstrated that the transaction was merely colourable in order to prevent the transaction falling outside the ambit of the primary object of the society, different considerations would apply. For example, an advance of
E £1,000 on the security of a few square feet of freehold land coupled with a collateral security charged upon consols to the market value of £1,500 would plainly be a colourable transaction, which would fall outside the scope of sect. 13, and would therefore be *ultra vires*. The fact that the margin of value over and above the amount advanced is small, and
F that consequently the society is unwilling to make the advance requested in the absence of collateral security, cannot, however, be the test to be applied in order to determine the question whether or not the mortgage is *ultra vires*. If this were so, the strange result would follow that, in all cases where collateral security was unnecessary, having regard to
G the margin of value existing in the mortgaged property, the taking of collateral security would be *intra vires*, but, in those cases where it was reasonable to require some collateral security owing to the smallness of the available margin of value, the mortgage would be held to be *ultra vires*, and the object of the Act—namely, to enable persons who are
H otherwise unable to provide a substantial part of the purchase price to borrow the money necessary for that purpose—would thereby be frustrated. This aspect of the section was considered by STIRLING, J., in *Sheffield & South Yorkshire Permanent Building Society* v. *Aizlewood* (1). There the question raised was whether or not the directors of a building society who had advanced moneys of their society on a mortgage of

leasehold property, together with a second mortgage of a colliery business and a collateral security by way of charge upon certain beneficial interests under a trust of personal estate, were liable for losses which arose out of the transaction. It was argued that the existence of the collateral security vitiated the whole transaction and rendered the directors liable for the loss. Stirling, J., refused to accept this argument, and held that they were not so liable. He said, at p. 451 : A

> . . . it was contended that the inclusion of those interests [that is, the personal property] in the securities vitiated the whole transaction—that, in fact, the inclusion of any personal element in the security would vitiate such a transaction. If this contention were well-founded, then it would seem to follow that the inclusion in a building society's mortgage of a personal covenant by the mortgagor for repayment of the advance, and reliance placed by the officers of the society on the solvency of the mortgagor, might equally vitiate any transaction of which those were elements. Yet it was not disputed in argument, and in my judgment properly, that a building society making an advance to a member on the security of freehold, copyhold, or leasehold estate, might take from him a personal covenant for payment of what might be due from him to the society ; and I think that the officers of the society might, to a certain extent, and for certain purposes, rely on the solvency of the mortgagor. For example, an action on the covenant of a solvent borrower affords an effectual and comparatively speedy and inexpensive mode of recovering what is due, and may be the means of avoiding the delay, costs, and liability incident to remedies (such as foreclosure, sale, or entry into possession) available only against the subject-matter of the security. If the circumstances of the borrower are such that his personal covenant is without value, the building society may, in my opinion, secure a like advantage by means of the personal guarantee of a third party or a charge on some readily available pure personal estate. The benefit so obtained must, however, be purely collateral, and the validity or propriety of the transaction is to be tested as if no such ingredient entered into it. If there be no freehold, copyhold, or leasehold estate comprised in the security, or if the estate so comprised be merely nominal, or its value out of all proportion to the amount advanced, the transaction is beyond the powers of the society, and invalid ; but where, as here, the borrower offers as security such estate to a substantial extent, an advance is within the powers conferred by the Act of 1874, and the question for the officers of the society to determine is what amount may properly be advanced, and that question they must decide having regard solely to the nature and value of the freehold, copyhold, or leasehold estate offered to them, and without reference to the solvency of the borrower or the worth of any personal estate he may be willing to throw in by way of security.

B C D E

As I understand this passage, the test which the judge says should be applied in determining whether or not a mortgage in favour of a building society by one of its members is within the powers conferred by sect. 13 of the 1874 Act is that one must look at all the circumstances relating to the loan, and, if it should appear that the transaction is colourable by reason of the fact that the real and chattel real property comprised in the security is of nominal value, or of a value so small that it is out of all proportion to the amount advanced, the transaction is beyond the powers of the society. In the latter part of the passage I have quoted, the judge seems to suggest that the question of *ultra vires* may depend on the opinion of the directors as to the amount which may properly be advanced, and it was argued that the question of *ultra vires* in the present case depended on the decision of the directors that they would or would not lend more than the normal three-quarters of the value in the absence of the collateral security. In my judgment, this is not a fair reading of the passage in question. The judgment must be read as a whole. If this is done, the test laid down appears to be that the mortgage must be

F G H

considered by itself, the question then being whether the freehold security is merely nominal or whether its value is out of all proportion to the amount advanced. In all cases where the advance is made on the security of property to be purchased in part out of the money advanced, the purchase price, if it accords with the value of the property, must afford the true criterion. If the amount of the advance is, in such a case, less than the amount of the purchase price, the transaction cannot be *ultra vires.* BENNETT, J., applied the decision of STIRLING, J., in *Sheffield & South Yorkshire Permanent Building Society* v. *Aizlewood* (1) to the facts before him in *Bradford Third Equitable Benefit Building Society* v. *Borders* (3), which are very similar to those of the present case. In so doing, he put the same construction on the passage I have quoted from the judgment of STIRLING, J., as that which I have expressed above, for he summed up the case he had to consider by saying, at p. 526 ([1939] 1 All E.R., at p. 496):

> It is a mortgage of freehold estate. The security of the freehold estate is not merely nominal. As between the plaintiffs and the defendant the transaction is one of loan on the security of freehold property. It is not a case in which freehold land has been added to unauthorised security merely to make it appear that the transaction was one of loan on authorised security when the truth was otherwise.

Applying the same test to the facts of the present case, I come to the conclusion that the mortgage of Sept. 29, 1933, was not *ultra vires* the society. It was said, however, that, if one looks at the agenda book of the society, it appears that the society were prepared to lend only £355 on the security of the freehold property, and that in truth and in fact £98 was lent on the security of the guarantee and charge given by Shepherd and Meyer. I am unable to follow this argument. The £98 was not secured solely or primarily on the security of the guarantee or charge. It was secured equally with the rest of the £452 8*s.*, the whole of which was advanced primarily on the freehold property. If that property realised on the enforcement of the security more than sufficient to repay the £452 8*s.*, no part of the collateral security would be liable to answer for any part of the advance. In such an event, it would be unnecessary to have recourse to the collateral security, and the position would be the same as it would be if no collateral security had in fact been taken. It is indeed difficult to understand how, in such a case, the transaction could be said to have been *ultra vires* from the moment the mortgage had been entered into. In ascertaining what is the real transaction between the parties, it is essential to consider the legal effect of the documents entered into: *Inland Revenue Commissioners* v. *Westminster (Duke)* (6), *per* LORD TOMLIN, at pp. 20, 21. The mortgage imposes on Salisbury the legal obligation of repaying the whole of the money advanced, and charges the whole of that money on the mortgaged property. As between himself and the society and its guarantors and the pool, the primary liability is placed on Salisbury and the mortgaged property. The guarantors and the pool are liable only secondarily. Indeed, at the time the mortgage was executed, Salisbury was ignorant

of the existence of the guarantee and the pool. It is true that the society required the secondary security, but there is no substitution of the secondary security for that of the mortgage. It was suggested that the real transaction between the parties was that £355 should be secured on the freehold property and £98 by the guarantee and the charge on the pool. There would have been justification for this view if the value A
of the freehold property had not, to the knowledge of the society, exceeded £355, for in that case, although the £98 was in form charged with the other £355 upon the freehold property, there would have been no real prospect of recovering it from any source other than the guarantee and the charge on the pool. In such a case, the guarantee and the B
supporting charge could not properly be said to be a collateral security in the real sense of the term. The county court judge has held that the society were advised by a competent surveyor that the property was worth £475, and were entitled to believe, and in fact did believe, that this was the fact. C

So far, I have dealt with the case on the footing that the giving of the collateral security was, as in *Aizlewood's* case (1), a term of the bargain between the society and the mortgagor, and as if the collateral security were included in the mortgage securing the advance. This, however, is not the fact, for here the transaction was carried out as the result of D
two separate agreements, one between the society and Salisbury and the other between the society and Shepherd and Meyer. The first agreement constituted the mortgage transaction between the mortgagor and mortgagee. The second constituted the collateral security for the mortgage. As I have already said, it is established that Salisbury had E
no knowledge of the existence of the second agreement. So far as he is concerned, the mortgage is in accord with the agreement into which he entered. If this agreement had stood alone, it could not have been held to be outside the scope of sect. 13 of the 1874 Act, although, having regard to the margin of the security, it may have been considered some- F
what hazardous on the part of the society to enter into it. When the transaction is considered from this aspect, however, it must be remembered that the moneys advanced are repayable by monthly instalments of principal and interest, starting at the expiration of one month from the date of the mortgage. There is nothing in the 1874 Act to G
suggest that the taking of collateral security from a third party for a mortgage *intra vires* the society can itself be *ultra vires*. It is to be observed that no advance is made to the guarantors, and that what is charged on the pool is any ultimate loss accruing to the society under the mortgage, with a limitation on such loss to a sum not exceeding H
£98. Further, it is difficult to appreciate how a transaction within the powers of the society can become *ultra vires* by reason of an agreement between the society and the guarantors of which Salisbury was in complete ignorance, and which is in itself unobjectionable except upon the footing that the transaction treated as a whole was colourable, and

entered into in order to enable the society to advance money in a manner not authorised by the Act of Parliament—namely, on personal security. As I have already said, I am unable to come to the conclusion that this was the object of the transaction.

Our attention was called to the decision of this court in *Cullerne* v. *London & Suburban General Permanent Building Society* (2), where LINDLEY, L.J., said, at p. 488:

> On looking carefully at the statutes by which these societies are governed, viz., the Building Societies Act, 1836, s. 4, and the previous statutes there referred to, viz., Friendly Societies Act, 1829, ss. 2, 13, 30 and 31, and the Friendly Societies Act, 1834, s. 9, it certainly does appear that building societies can only advance money on the security of landed property, freehold, copyhold, or leasehold.

The Building Societies Act, 1874, is to the same effect, except that public funds are added. In the case then under consideration, the advance was to a member of the society on the security of his shares in that society, and the point considered by STIRLING, J., and BENNETT, J., respectively, did not; therefore, arise. In my judgment, the decision in *Cullerne's* case (2) affords no assistance in the consideration of the present case.

I have no hesitation in holding that the mortgage of Sept. 29, 1933, is not *ultra vires* the society. Since the hearing of this case in the county court, an Act has been passed which deals expressly with the future construction of sect. 13 of the 1874 Act. It is the Building Societies Act, 1939. Sect. 1 provides that, in determining the amount of any advance made before the commencement of this Act—namely, Aug. 4, 1939—upon the security of freehold, copyhold or leasehold estate, a building society shall be deemed always to have had power to take into account, besides the value of the freehold, copyhold or leasehold estate, the value of any additional security for the advance. There is, however, an express provision in sect. 17 of the Act to the effect that nothing in the Act shall deprive a party to any proceedings which were instituted in any court before Feb. 21, 1939, of any relief to which the party would have been entitled in those proceedings if the Act had not been passed. The present proceedings were instituted in Mar., 1938, and the Act has no application to them. It was argued by counsel for the respondents that this Act ought to be considered in construing sect. 13 of the 1874 Act. I am unable to accede to this argument. In my judgment, the 1939 Act leaves the question of the true construction of sect. 13 of the 1874 Act undisturbed, so far as this appeal is concerned.

An interesting argument was addressed to us on the difficult point whether or not, on the assumption that the mortgage was *ultra vires* the society, it was open to the defendant to raise by way of defence the question of *ultra vires* in order to avoid his own liability to the society. A large number of authorities were cited, including *Re Coltman, Coltman* v. *Coltman* (7), a case not unlike the present, decided by the Court of Appeal in 1881. Having regard to the conclusion at which I have arrived that the mortgage of Sept. 29, 1933, is not *ultra vires*, I find it unnecessary for me to deal with either of these points, and I refrain from expressing any opinion with regard to them.

The question whether the society made any misrepresentation to Salisbury which induced him to enter into the mortgage remains to be considered. The county court judge has dismissed the defendant's counterclaim, but it is argued on his behalf that the judge in fact found A that the society, although without intending to defraud him, made an untrue statement on which the defendant acted, and that, in these circumstances, the judgment ought to have been for him on this branch of his counterclaim.

It is, I think, material to understand what are the misrepresentations B relied on in the pleadings. In para. 2 of the particulars of defence and counterclaim, the defendant alleged that he was induced to enter into the mortgage of Sept. 29, 1933, by the false and fraudulent representations of the society, their servants and agents. Particulars are given of the misrepresentations. It was said, first, that the dwelling-house was built C in an efficient and workmanlike manner of proper materials and in compliance with the requirements of the local authority. The representation was made partly in a brochure issued by the builders with the authority of the society, and is partly to be implied from the society's conduct in having the property inspected by their surveyors at the defen- D dant's expense, and in accepting the surveyor's report thereon on the defendant's behalf. Secondly, it was said that the dwelling-house and land were a sufficient security for the advance of £452 8*s*., and were worth at least £475. The representation was made by letter dated Aug. 22, 1933, and by the plaintiffs' rules. E

By para. 3 of the particulars of the defence and counterclaim, it is alleged as follows:

> . . . in truth and in fact the said representations were false to the society's knowledge.

By way of counterclaim, the defendant repeated paras. 2 and 3 of the F particulars of claim and counterclaim, and said that, by reason of the false and fraudulent representations, or, alternatively, by reason of the negligence of the society's surveyors, he was induced to enter into a contract to purchase the dwelling-house and land, and into the mortgage, whereby he had suffered damage. The county court judge has found G that the society were in no way responsible for any misrepresentations made under subpara. 2 (1) of the particulars of the defence and counterclaim, that the society made no misrepresentation which induced the defendant to enter into the contract to purchase, and that there was no negligence on the part of the surveyors. H

The defendant, as he was bound to do, has accepted these findings, and I need not deal with them further. The only question now raised is whether the execution of the mortgage by the defendant was induced by fraudulent misrepresentation. The circumstances are certainly peculiar. Having, on May 26, 1933, entered into a contract with the builders for the purchase of the land and the erection of a house thereon by the builders at a total cost of £475, the defendant on the same date filled in a printed form supplied by the society, applying to it for an advance upon a mortgage of the land and house. The form contained a number of questions addressed to the defendant, which were answered A by him or by some person on his behalf. These answers make it clear that the house to be mortgaged was in the course of construction, that the cost of the land was £50, and that the total amount of the building contract was for £425, making a total price of £475 for the land and the house to be erected on it.

B The advance applied for by the defendant was £452 8*s.*, the period of repayment asked being 20 years. The applicant was asked if he intended to occupy the property, to which he replied in the affirmative, and he was also asked to give the fullest details as to situation of the property to enable a surveyor to find the property. The surveyor referred to C was obviously a surveyor to be employed by the society. The sole security offered by the defendant was the land and house.

Some time after this application, the society instructed a firm of surveyors, Messrs. Gale, Heath & Sneath, to survey the defendant's property and report on its value. A survey was made and a report sent D to the society. On Aug. 22, 1933, the general manager of the society wrote to the defendant as follows:

> I am pleased to inform you that the directors have granted to you the under-mentioned advance subject to the title of the property offered as security being satisfactory and subject to the rules and to the completion date being approved by the society.

E

At the foot of this letter, it is stated that this advance is granted subject to the property being completed to the satisfaction of the society's surveyor, and the following information is stated:

> Security: One freehold dwelling-house: Situate: 71, Hounslow Road, Feltham, F Middlesex. Advance: £452 8*s.* (five 8/10th shares) on the second C. Table. Interest: 5 per cent. Term: 18 years 10½ months; lunar monthly payments £2 18*s.*

For all practical purposes, the information as to the security accords with that supplied by the defendant to the society in his application form.

G It is difficult to see how an answer in the affirmative to a request for an advance can be said to be the inducement which caused the defendant to enter into the mortgage to secure the advance. The defendant's counsel puts the case in this way. He says that the fact that the society agreed to make the advance after obtaining a surveyor's H report confirmed the defendant in the view that the price he had agreed to pay to the builders for the land and house was a proper price, and that the value of the property must substantially exceed that amount. He further argued that the statement that the security for the loan was to be the freehold house represented that this was the only security, and that, if he had been informed of the fact that the society had been given collateral security in addition to the security afforded by the house and land alone, he would have become suspicious, and would have taken steps to discover if he had any ground to set aside his contract to purchase the land and to build the house, his complaint being that, by reason of defective workmanship, the house was not in fact worth £475. Although I am clearly of opinion that it is expedient to inform a mortgagor, in a case like the present, that collateral security is being taken, I am of opinion that there was no duty on the society to disclose the fact that they had obtained collateral security, and I find it impossible to understand how an affirmative answer to an application to lend the sum asked on the security offered can be treated as a misrepresentation inducing the contract. As between the society and Salisbury, the society agreed to do precisely what Salisbury asked it to do—namely, to lend him £452 8*s*. on the security of a house and ground he was to acquire for a total expenditure of £475. The county court judge has found that the valuation obtained by the society was *bona fide*, and believed by the society to be a proper valuation, so that the society could not have known or suspected that the building was defective. Indeed, it was not completed at the date when the valuation was made.

I will assume, however, for the purposes of the defendant's claim, that the offer to lend the money came from the society, and is contained in the letter of Aug. 22, 1933. Is it possible to read into this letter the two statements which counsel for the defendant asks the court to do —namely, first, that the house is worth a sum in excess of £475 sufficient to justify, on the basis of the normal three-quarters rule, a loan of £452, and, secondly, that it is the only security for the £452 8*s*. to be advanced. It is a fact that £452 8*s*. is to be advanced in respect of the house, which is to cost £475, and that, as between the society and Salisbury, the house is to be the sole security. The letter of Aug. 22, 1933, is, to put it at its lowest, consonant with this state of facts, and was written, I think, without any improper purpose, and without any intention of making any false statement or concealment. The letter simply repeated what the society had already been told by the defendant in his application, and it was not intended by the society to do anything else. I am unable to read into the letter any statement which was false to the knowledge of the society, nor can I treat it as having been written with such carelessness as to constitute gross negligence sufficient to support an action for deceit, in which, of course, it is a necessary ingredient that an intention to deceive be found: *Angus* v. *Clifford* (8). The county court judge deals with this letter as follows:

> Then, coming to the second paragraph of the particulars, the plaintiffs are alleged to have represented that the dwelling-house and land were a sufficient security for the advance of £452 8s., and were worth at least £475. That, I think, rests upon the letter of Aug. 22, 1933, in which it is stated: "Security: One freehold dwelling-house situate at 71, Hounslow Road. Advance of £452 8*s*." In my opinion, when one considers the class of people to whom that representation was made, a small householder, perfectly intelligent and respectable, but not a man used to dealing with large transactions and that kind of thing, I think that that is a representation that

> it is sufficient security. It was not sufficient security for the building society, and, in my opinion, the building society never would have advanced that amount upon the security of the house. It was only because of the fact that they had good collateral security for the excess that they made the advance they did. The danger of this collateral security business without disclosure to purchasers of houses in estates of this kind has been dealt with by BENNETT, J., and I do not think that I need repeat what he has said. It is a happy feature to find that a building society A such as the Halifax Building Society, a very good building society indeed, has acted immediately upon the observations of BENNETT, J., and now discloses the collateral security to the mortgagor. Be that as it may, I think that there is in this letter a representation that the security was sufficient for the advance. It certainly was not sufficient, and it was known perfectly well to the society that it was not a sufficient security. I think that, if they had put that in with the intention of concealing it from the mortgagor, I should consider that the defendant had succeeded in this case, but I do not think there was any intention to defraud at all.

B With all respect, I am unable to follow this conclusion. The defendant knew that he had agreed to pay the total sum of £475 for the house, and, if by "sufficient security" is meant that there was a substantial margin of value in the house over the value of the £452 8*s*. being lent, C it is difficult to see any justification for the view that, by agreeing to lend the amount advanced, there is any representation to the borrower applicant of the nature suggested.

The judge, after stating that he thought that in the society's letter of Aug. 22 already referred to there was a representation that the security D was sufficient for the advance, without in any way attempting to define what is meant by the word "sufficient," proceeds as follows:

> I think that, if they had put that in with the intention of concealing it [the collateral security] from the mortgagor, I should consider that the defendant had succeeded in this case, but I do not think that there was any intention to defraud at all.

E I think that this is a finding that the letter was never intended by the society to have any other purpose than that expressed on its face—namely, that the society was willing to lend to the defendant the £452 8*s*. he was asking them to lend because the surveyor had told the society that his house was worth the purchase price—namely, £475. The F judge goes on to state that the society advanced the money on what they believed to be the true value of the property—namely, £475—and that the only reason why they did not make a show of the collateral security (and I think this means generally, and does not refer to any failure to disclose it in the particular letter) was that the society thought G that it might be detrimental to business, in that, the mortgagor would become careless and say to himself: "It is all right if I do not pay this. They have other security." I must confess that I fail to appreciate the precise meaning of this sentence, but, reading it with the rest of the judgment, I am unable to read it as a finding that the society made any H representation false to its knowledge, whether actively or by non-disclosure of the existence of the collateral security. The judge proceeds as follows:

> I was inclined [at some time during the hearing but not at the moment of the judgment] to think that there was a misrepresentation, but the collateral security was concealed for a good purpose, and not with the intention in any way of committing a fraud.

Of course, if the judge had found on proper material that there was an untrue representation, then, no matter with what purpose or intent it was made, the society would have been liable. However, as I have already pointed out, I do not think that the judge has so found, or intended so to find. If he had done so, I think that the finding, being one dependent entirely on the inferences to be drawn from the letter, would A
not have been justified. For the reasons I have stated, I think that the county court judge came to a correct conclusion with regard to the questions arising on both claim and counterclaim, and I agree, therefore, that this appeal against his order should be dismissed with costs.

B

Atkinson, J.: This action arose out of a method of business adopted by building societies and builders for the last 10 years in the development of building estates. Building societies exist for the purpose of making advances to their members upon the security of land and houses to enable them to build or buy houses. Normally, societies C
will not lend more than 75 per cent. of the value of a house, but experience has shown that many would-be purchasers are not in a position to find the remaining 25 per cent. To meet this difficulty, a system has grown up by which the building societies lend to the purchaser up to 95 per cent. of the value of the house, taking, in addition to a mortgage on the D
house, collateral security from the builders to secure further the additional 20 per cent. of the value advanced over and above their normal lending limit. The further security takes the form of a guarantee from the builders, supported by a charge upon a fund known as the pool, built up by contributions from the builders in the manner described E
by Luxmoore, L.J. An arrangement was concluded in June, 1932, between the society and a firm of builders, New Ideal Homesteads, Ltd., for the development of the Hanworth Estate on these lines. There was one objectionable feature in the scheme (now forbidden by the Building Societies Act, 1939). The purchaser was not informed of F
the giving of the further security. This concealment was of value both to the society and to the builders—to the society because they thought that, if the borrower knew that there was other security available, he might become slack in his payments, and to the builders because they were enabled to point to the fact that the building society were G
ready to advance 95 per cent. of the cost of the house as evidence that the buyer was really getting value for his money, and could safely trust to the work being well done, without having any surveyor to act on his behalf.

The defendant visited the Hanworth Estate in May, 1933. I need H
not go through the interview he had with the builders. He chose the type of house and his plot, and was told that the cost would be £475—£50 for the land and £425 for the house—that the plaintiffs would lend £452 8*s*. on mortgage of the house, and that he would have to pay a cash deposit of only £22 12*s*. When he talked about his own surveyor,

he was successfully headed off in the way I have indicated. On May 20, 1933, he signed three documents—namely, an agreement for the purchase of the land, an agreement for the erection by the builders of the house for £425, and an application to the plaintiff society for an advance of £452 8*s*. upon the house. The house was built, and, as it neared completion, A the plaintiff society instructed their surveyor to survey on their behalf. On Aug. 16, they reported that, after careful examination and consideration of the property, their valuation was £475. On Aug. 22, 1933, the plaintiffs wrote to the defendant agreeing to make the advance requested. The relevant passages are as follow:

B

> I am pleased to inform you that the directors have granted to you the undermentioned advance subject to the title to the property offered as security being satisfactory. . . . This advance is granted subject to the property being completed to the satisfaction of the society's surveyor: Security one freehold dwelling-house situate at 71, Hounslow Road, Feltham, Middlesex.

C The defendant read that letter as indicating that the only security for the advance was his house, and that that security was deemed sufficient by the society to justify an advance up to 95 per cent. of the cost. It satisfied him that he could safely complete the transaction, and, relying upon it, he did so.

D On Aug. 25, the valuers reported a further inspection, and stated that the proposed advance might then be made. On Sept. 29, the transaction was completed. The plaintiff society paid the sum of £452 8*s*. on the written authority of the defendant, and the defendant executed a mortgage on his property securing repayment to the plaintiffs E of that sum. The defendant went into possession. He soon found out that, metaphorically speaking, he had suffered a fate somewhat similar to that of the man who travelled from Jerusalem to Jericho. The house was disgracefully built. The workmanship was bad. The materials were bad. The bye-laws in many respects had been ignored. F The county court judge has found that the cost of remedying the defects was nearer £110 than the £87 claimed. Unfortunately, the official employed by the local authority to inspect houses for the purpose of seeing whether the bye-laws had been complied with had, owing to his having too much to do, passed the house as complying with the bye-G laws when it did not. The report of the surveyors for the plaintiffs (for which the defendant had to pay) was based on a misplaced confidence in the builders rather than upon any care or skill exercised by them. None of those matters, however, implicated the plaintiffs.

Three years after completion, the defendant, financially crippled by H the expense to which he had been put, and by his wife's illness, which he attributed, rightly or wrongly, to the unhealthy condition of the house, began to get into arrears with his monthly payments to the plaintiff society. Then he learned of the existence of the scheme for further security, and learned that there had never been any real foundation for his belief that he could safely rely upon the house being well-built because the plaintiffs were advancing 95 per cent. of the cost on the sole security of the house.

In this action, the plaintiffs are claiming possession because of the
defendant's failure to carry out the terms of the mortgage. It is admitted
that they are entitled to judgment unless the defendant can establish
either of the two defences raised. The first is that the defendant was A
induced to enter into the mortgage by the false representation, said
to be contained in the letter of Aug. 22, 1933, that the plaintiff society
was advancing £452 8*s.* on the sole security of the defendant's house,
thereby representing that the society deemed it well worth £475, and
sufficient security for the advance of 95 per cent. This defence also B
forms the basis of a counterclaim for damages for fraud.

The county court judge has found that the letter could reasonably
be read as a representation that the security was sufficient, and that
the plaintiff society knew perfectly well that it was not sufficient. He
has also found that the collateral security was intentionally not dis- C
closed, though for what he calls a good purpose. However, he has
negatived any intention to defraud. It is contended for the appellant
that, on the judge's findings, he is entitled to judgment on the plea
of fraud, and that a good purpose does not prevent a representation
knowingly untrue from being fraudulent. In order to maintain an D
action or a plea based on deceit, it is necessary to establish a conscious
knowledge of the falsity of the argument upon which reliance is placed.
It may be possible—I express no opinion about it—reasonably to read
the letter as representing that the house was the sole and sufficient
security, but it is necessary to show that the writer knew that it might E
be read in that sense. Non-disclosure can support an action for deceit
only if it causes that which is stated to give a wrong impression and
if there is, on the part of the person making the representation, know-
ledge that the non-disclosure will cause that which is stated to mislead.
In *Angus* v. *Clifford* (8), Bowen, L.J., said, at p. 472: F

> It does not follow because a man uses language, that he is conscious of the way in which it will be understood by those who read it. Unless he is conscious that it will be understood in a different manner from that in which he is honestly though blunderingly using it, he is not fraudulent, he is not dishonest. An honest blunder in the use of language is not dishonest.

He had said, at p. 471: G

> So far from saying that you cannot look into a man's mind, you must look into it if you are going to find fraud against him.

In *Nocton* v. *Ashburton* (9), in every opinion it was said that the fraud
proved must be actual fraud, and that there must be an intention to
deceive. H

The judge has not found that there was any knowledge, or even suspicion, that the letter might be read in any sense other than that of a mere assent to do that which the defendant had asked—namely, advance to him £452 8*s.* on his house—and I think that his finding that there was no intent to defraud means that he is satisfied that there was no such guilty knowledge. It is, therefore, impossible for this court to interfere with his judgment on that part of the case. It is unnecessary to consider whether it could possibly be held that the defendant acted in any way different from that in which he would have acted if he had been told of the further security. The appeal on the defence of fraud, A therefore, fails.

The second defence is founded on the allegation that the mortgage which the plaintiffs are seeking to enforce was *ultra vires* the society, and, therefore, void. The power of the building society to lend money is conferred by the Building Societies Act, 1874, s. 13. It has been read B by SLESSER, L.J. It is said in this appeal that the facts show that the society never did in fact lend the sum of £452 8*s.* upon the security of freehold, copyhold or leasehold estate, but that, as to £98, part thereof, it was lent upon a security upon which the society had no power to lend.

C There is, in my opinion, conclusive authority for the proposition that any transaction that is beyond and outside the power contained in sect. 13 of the Act is contrary to law and invalid: *Cullerne* v. *London & Suburban General Permanent Building Society* (2), at p. 488, *Wenlock (Baroness)* v. *River Dee Co.* (4), at p. 362, and *Amalgamated Society of* D *Railway Servants* v. *Osborne* (10), at p. 87. At the same time, it is well established that statutory powers must not be narrowly construed. It must be assumed that they are intended to be effective, and to include whatever may be derived by reasonable implication from the statutory provisions. However, that, in my view, marks the limit of what can be E read into statutory provisions such as the Building Societies Act, 1874, s. 13.

In *Amalgamated Society of Railway Servants* v. *Osborne* (10) LORD MACNAGHTEN was dealing with the broad principle, and he said, at p. 94:

F

> The principle, I think, is nowhere stated more clearly than it is by LORD WATSON in *Wenlock (Baroness)* v. *River Dee Co.* (4), in the following passage, at p. 362: "Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be G expressly conferred or derived by reasonable implication from its provisions."

I may point out that LORD WATSON had used the same expressions in *A.-G.* v. *Great Eastern Ry. Co.* (5), at p. 486. The expression he used there was "a fair implication." Then LORD MACNAGHTEN continued as follows, at p. 97:

H

> The learned counsel for the appellants did not, as I understood their argument, venture to contend that the power which they claimed could be derived by reasonable implication from the language of the legislature. They said it was a power "incidental," "ancillary," or "conducive" to the purposes of trade unions. If these rather loose expressions are meant to cover something beyond what may be found in the language which the legislature has used, all I can say is that, so far as I know, there is no foundation in principle or authority for the proposition involved in their use. LORD SELBORNE, L.C., no doubt did use the term "inci-

> dental" in a well-known passage in his judgment in *A.-G.* v. *Great Eastern Ry. Co.* (5). But Lord Watson certainly understood him to use it as equivalent to what might be derived by reasonable implication from the language of the Act to which the company owed its constitution; and the Earl of Selborne, L.C., himself, to judge from his language in *Murray* v. *Scott* (11), could have meant nothing more.

The same test of "reasonable or fair implication" was adopted by Lord Atkinson. A

In order to decide whether or not that which was done in this case came within the society's statutory powers, it is necessary to begin by ascertaining with some exactitude what was done, and what the precise question to be determined is. B The judge has found that the transaction was carried out in pursuance of an ordinary business proposition by which the plaintiffs were to lend to a purchaser up to 95 per cent. of the true value of the house to be built, taking, as regards 20 per cent. of that value, collateral security from the builders. The history of the negotiations between the society and the builders shows C that the latter were trying for some time to get the society to go beyond their usual limit of 75 per cent. They were not trying to force the society to do something it had no power to do, but were trying merely to force the society to do something which was not in accordance, perhaps, with a conservative policy, something which might involve a risk D which the builders were ready to carry. On June 30, 1932, the builders gave the following undertaking to the society:

> In consideration of the Halifax Building Society (hereinafter called "the society") making advances in excess of the normal lending limit to sundry purchasers of houses from us or one of us, or from New Ideal Homesteads, Ltd., we Philip Edward Shepherd, of Bignores, Dartford, in the county of Kent, and Leo E Henry Paul Meyer, of Ideal House, Harold Road, Erith, in the said county, hereby jointly and severally undertake that we will forthwith, upon being requested by the society so to do, purchase from the society for the amount owing under the mortgage plus all costs and expenses any properties mortgaged by such purchasers to the society which shall at any time hereafter come into the possession of the society.

F

By a letter of May 26, 1933, the defendant in his application form stated that the advance he required on the security of his house was £452 8*s*. By letter of Aug. 22, the society agreed to advance that sum on that property, having on Aug. 16 had a report from their valuers that, after careful examination and consideration of the property, their valuation was £475. G

The next relevant document is the agenda of a meeting of the board of the society, dated Sept. 6, 1933. The particulars entered in the document, which is called the agenda book, are the name of the defendant, Joseph Salisbury, and columns with figures showing his shares. Then under the heading of "Advances," is the sum of £452 8*s*., lending limit £355, H value £475, and so on. Then underneath are these words:

> Guarantee by Messrs. Shepherd and Meyer for £98, deposit £20 and lien on pool of £35,916.

The minute of the meeting shows that the transactions set out in the agenda were approved. On Sept. 29, three documents came into existence. There was first the charge given by the defendant to the society:

> I hereby authorise and request you to draw the cheque for the amount of loan [£452 8*s*.] which you are to advance to me on the above property in favour of my solicitor . . .

A The heading was 71, Hounslow Road, Feltham, Middlesex. There the words appear very clearly:

> . . . of loan which [the society] are to advance to me on the above property . . .

Then there was a mortgage. There, again, it is perfectly clear from that B document that the amount which was being advanced on the defendant's house was £452 8*s*., as there is a recital that the mortgagor had applied for that advance, and the recital of an agreement to advance that sum. Then there followed the usual clauses of covenant to repay, and the clauses charging the loan on the house.

C There was also signed that day, however, a document between the society and the builders called the charge. There, again, that document makes it quite clear, I think, that the amount being advanced upon this house was £452 8*s*. It is a printed document, and there is the following definition of the expression "contemporaneous mortgage."

> D "Contemporaneous mortgage" shall mean a mortgage bearing even date with but executed before this deed, and made between Joseph Salisbury of the one part and the society of the other part, whereby in consideration of the sum of £452 8*s*. advanced or to be advanced by the society to the borrower in accordance with the rules of the society a dwelling-house situate and known as 71, Hounslow Road, Feltham, in the county of Middlesex was demised by the borrower to the society . . .

E Then follow numerous clauses under which the guarantors guarantee to the limit of the 20 per cent. excess, and guarantee to charge the account known as the pool with the repayments of the whole sum with a limit of £98 excess.

It is argued for the appellant that the agenda and charge say that F the £452 8*s*. was not in truth being advanced on the house, but that, as to £98 of it, it was advanced on the guarantee and the charge on the pool. It is said that the power to lend on the security of personal property, such as a pool, cannot be derived by reasonable implication from a statutory power to lend upon the security of freehold, copyhold or G leasehold estates. While, as a bare proposition of law, I think that the latter contention may very well be right, this charge is far removed from a simple lending on the security of personal property. It was a charge given in support of a guarantee of repayment of money lent to someone else—the defendant—on the security of a mortgage of freehold property. H The pool was charged with the repayment of any deficit arising by realisation of the mortgaged property, with a limit of £98. In my view, however, it is unnecessary to decide on this appeal the question of the legality of the charge. It is indisputably clear that there were two entirely separate contracts or transactions, which were between different parties. The defendant, party to the mortgage, was ignorant of the existence of the transaction between the society and the builders. It is equally clear that the full sum of £452 8*s*. was in fact lent to the defendant, and that repayment of that sum was secured by a charge upon the property in question. It is, of course, equally clear that that sum would never have been advanced on the property if the builders had not provided other and further security. A

The sole question in this case is the validity of the mortgage deed. Was the mortgage deed which was entered into between the society and the defendant valid or was it not? There can be no doubt that the defendant borrowed from the plaintiffs, and had the benefit of the full sum of £452 8*s*. There can be no doubt that he charged the property B with the repayment of that sum. He knew that he was doing it. He intended to do it. The mortgage is in exact accord with the transaction which he had made, and as he understood it. That, and that alone, was the transaction between the plaintiff society and the defendant. That transaction was plainly within the powers of the society. Considered by C itself, it may have been somewhat rash, but it is impossible to say that a mortgage for 95 per cent. of the value of a property is something outside sect. 13 of the Act. I am unable to see how a transaction within the powers of the society can pass outside and beyond those powers because of some other bargain which in no way binds or affects the defendant, and D of which he is in complete ignorance.

As I have said, it is unnecessary on this appeal to determine the question of the validity of the charge taken from the builders, but this dilemma may be pointed out. If it was valid, of course there is nothing more to be said. If it was invalid, the difficulty in the way of the E defendant in saying that his mortgage can be affected by it is surely increased. How can an agreement between A and B, *prima facie* valid, be rendered invalid by an agreement between A and C which is itself invalid and of no effect? *Sheffield & South Yorkshire Permanent Building Society* v. *Aizlewood* (1) has been relied upon by both parties. It must F be remembered that in that case the borrower was a party to the whole transaction. He gave both the primary and the collateral security. In a case of that kind, the approach is easy. The court can go behind the form of the transaction for the purpose of finding out what was the real bargain between the parties, and can then determine whether or not G that bargain, comprising all the circumstances, is within the society's powers. Where, however, the mortgage of the property and the collateral security are the subject-matter of different agreements between different parties, the position is very different. The court can, of course, still go behind the form of the mortgage for the purpose of ascertaining whether H it contained the true agreement, and the whole of the true agreement, between the parties to the mortgage. It can then declare whether or not that agreement was *ultra vires* the society, and the facts that the borrower did not know the limitation of the society's powers and that the transaction was *ultra vires* the society would be immaterial. Here, however, the court is being asked to go far beyond that. It is being asked to say that, although the mortgage contains the real and only bargain between the society and the defendant—a bargain which was within the powers of the society—that bargain was or became *ultra vires* by reason of a contract between the society and a third party, of which the defendant was wholly ignorant, and which was itself void and of no effect.

There was a test laid down in *Aizlewood's* case (1), by STIRLING, J., which, if a good test in that case, must be a good test in this case. Speaking of a collateral benefit he said, at p. 451:

> The benefit so obtained must, however, be purely collateral, and the validity or propriety of the transaction is to be tested as if no such ingredient entered into it.

In my opinion, the further benefit was purely collateral. The main security was believed to be worth more than the sum advanced. But for the collateral security, the validity of the mortgage could not have been challenged. I am myself satisfied that the society entered into a legal and valid transaction with the defendant, and the fact that the society were induced to enter into that transaction by the giving of a further security by somebody else (which *ex hypothesi* was void) had no effect upon its validity. I agree that the appeal fails, and must be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *William Sedley & Co.* (for the appellant); *F. B. Brook* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

CATOR *v.* NEWTON AND BATES.

[COURT OF APPEAL (Slesser and Luxmoore, L.JJ., and Atkinson, J.), **November 20, 1939.**]

Land Registration—Notice—Positive covenant noted on register—Whether binding on subsequent purchaser—Land Registration Act, 1925 (c. 21), *s.* 20

N. was registered on the Land Register as the owner with an absolute title of certain land. There was also on the register an entry that the land was subject to a covenant by N. to pay a fair share of the expense of maintaining certain roads. N. conveyed the property to B. by a transfer in the usual form, but containing no covenant of indemnity against the liability under N.'s covenant. It was contended that, by reason of the entry on the register of notice of the covenant, the transferee was liable under the covenant:—

HELD: the covenant, being a positive one, would not run with the land, and the fact that notice of the covenant was entered on the register did not affect the position. B. was, therefore, not liable under the covenant.

[**EDITORIAL NOTE.** The recent increase both in the amount of land becoming subject to compulsory registration and in the amount being voluntarily placed upon the register adds to the importance of this case. It is well established both that a positive covenant does not run with the land and that the entry on the register is notice to all the world of the covenant. It might be thought that these two propositions would justify an inference that a purchaser buying with notice of the covenant was affected by it, but this is held not to be so, and the liability in this respect under a positive covenant is the same in the case of registered land as it is in the case of unregistered land.

As to Effect of Entry of Notice on the Register, see HALSBURY, Hailsham Edn., Vol. 19, pp. 541-544, paras. 1269-1279 ; and for Cases, see DIGEST, Vol. 38, p. 756, Nos. 906, 907.] A

Appeal by the defendant Newton from an order of His Honour Judge Sir Gerald Hurst, K.C., given at the Bromley County Court on July 18, 1939. The plaintiff claimed a proportion of the cost of maintaining roads on an estate which he owned. In 1919, the defendant B Newton purchased the freehold of a property on the estate, and covenanted with the then estate owner to pay a fair share of the cost of maintaining certain roads. He became registered as owner with absolute title, and an entry in the register showed that the land was subject to this covenant. In 1928, he transferred his interest in the C property to the defendant Bates, and the transfer referred to the entry in the register. The plaintiff sued Newton in the county court, and Newton joined Bates, claiming indemnity. The judge held that Newton was liable to the plaintiff under the covenant and had no ground for claiming an indemnity from Bates. The defendant Newton appealed. D The facts and the argument are fully set out in the judgment of Luxmoore, L.J.

J. V. Nesbitt for the appellant.

R. S. Lazarus for the respondent Bates.

E

Luxmoore, L.J.: The claim in this case was by the owner of an estate at Beckenham for the sum of £6 18*s.* 1*d.*, being a proportion of the maintenance charges for roads on that estate. It appears that there was originally a lease of the premises in question, but I need not refer to that, for on Nov. 19, 1919, Newton purchased the freehold of the F property in respect of which this charge is claimed. On that conveyance, Newton entered into a covenant with the then estate owner to the effect that he would repay to the owner for the time being of the estate at Beckenham a fair share of the expense of maintaining and keeping in good and substantial repair the whole of the divisions, G roads, footpaths and water drains in connection with the estate to the east of a certain road which is mentioned in the covenant.

In due course, Newton sold the property, both the leasehold and the freehold interest, on Apr. 27, 1928, to one Bates. At the time of the sale, Newton had been registered at the land registry as the owner H with an absolute title of the land in question. The property was conveyed by Newton to Bates by a transfer in the common form, which referred to the registered title and stated that on Apr. 27, 1928, in consideration of the purchase price paid by Bates, the receipt whereof was acknowledged, Newton, as beneficial owner, transferred to Bates the property comprised in the title. It appears from the land certificate, which was before the county court judge, that at some time or other an entry had been made stating that the land in question was subject to the covenant entered into on Nov. 19, 1919, between the estate owner and Newton to which I have just referred.

A That being so, Bates did not, in the transfer, enter into any covenant to indemnify Newton against his personal liability under the covenant in the deed executed on Nov. 10, 1919, and therefore Newton remained liable without the benefit of any right to indemnification from Bates. Of course, if Newton or his advisers had thought of the matter, they B would no doubt have inserted in the transfer, as they would have been entitled to do, an express covenant for indemnity, but, in the absence of an express covenant for indemnity, unless there is some provision in the Land Registration Act, there is no right of indemnity at all. It is to be observed that the covenant in question is a positive covenant, C and is, therefore, one the benefit and the burden of which do not pass to the purchaser of the property except by express provision to that effect.

It is said that, under the Land Registration Act, 1925, s. 20, some liability is imposed on Bates by reason of the transfer from Newton. D It is said that he has become liable, not to pay the estate owner the proportion of the charge, but to indemnify Newton in respect of it, and it is sought to obtain that implied indemnity from the provisions of the Land Registration Act, 1925, s. 20, which provides as follows:

> (1) In the case of a freehold estate registered with an absolute title, a disposition of E the registered land . . . for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple . . . together with all rights, privileges and appurtenances belonging or appurtenant thereto, including . . . the appropriate rights and interests which would under the Law of Property Act, 1925, have been transferred if the land had not been registered, subject (a) to the incumbrances and other entries, if any, appearing on the register . . .

F It is said that there is an entry of this covenant on the register, and that, therefore, the mere reference to the fact that the estate is taken subject to that entry has imposed some liability on the transferee of the property. In my judgment, it is impossible to spell any such result out of the words of the covenant. All that it says is that the trans- G feree shall take subject to the encumbrances and other entries. One looks at the entry and sees what its nature is. If it is an entry which simply refers to the existence of a positive covenant the burden of which has not been assigned, it is impossible to say that the transferee has been subjected to that burden by the mere fact that the section H says that he takes subject to that entry. His legal liability is not affected. He is not in law liable to the estate owner in respect of the covenant, and, in the absence of any express covenant for indemnity, it is indeed, to my mind, impossible to see how he could have been subjected to such a liability.

Of course, when the case came before the county court judge, Newton's advisers admitted that he was liable on the personal covenant. Indeed, they could have done nothing else. It is quite a different step to say that, because there is a reference to the entry in sect. 20 of the Act, there is to be implied in this transfer a covenant for indemnity. As I have already said, Newton could have taken such a covenant if he had been so minded, but failed to do so. It may be open to him to get the transfer rectified by having such a covenant inserted in it, but that is not a matter which we have to determine, and I say nothing with regard to it. So far as the judgment of the county court judge is concerned, it is, to my mind, impossible to see how he could have come to any other conclusion than that to which in fact he came—namely, that there is nothing in the Land Registration Act, 1925, to impose a burden on Bates to indemnify Newton in respect of the personal and affirmative covenant into which he entered. In those circumstances, I think that the judgment was right, and that this appeal fails, and must be dismissed, with the usual consequences.

Slesser, L.J.: I agree.

Atkinson, J.: I agree.

Appeal dismissed with costs.

Solicitors: *W. G. Weller* (for the appellant); *Jutsum, Jones, Arthur & Light* (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

TOMLEY AND OTHERS *v.* GOWER AND McADAM.

[Chancery Division (Bennett, J.), **November 30, 1939**.]

Emergency Legislation—Foreclosure proceedings—Leave to commence—Parties to application—Inability to pay due to war—Onus of proof—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2) (*b*), (4).

In an application for leave to institute foreclosure proceedings against G. and A., it appeared that G. had mortgaged to the plaintiffs certain property with a registered title. Subsequently G. agreed to sell his equity of redemption to A. on condition that G. was released from his liability under the covenant in the mortgage. As between G. and A. the sale of the equity of redemption was completed, but the mortgagees refused to execute the release and to consent to the registration of A. as registered owner, alleging that certain payments due under the mortgage had not been made. It was contended that G. had been improperly added as a party to the application:—

Held: (i) G. was properly made a party.

(ii) the onus of proving that the debtor would have been able to pay the debt but for the outbreak of war is upon the debtor, and he does not discharge that onus where it is a mere matter of speculation whether he would have been able to discharge the debt.

[Editorial Note. Where it is necessary to apply for leave to institute proceedings, all persons who will be parties to the proceedings must be made parties to the application, and this would appear to be so even where the parties might be merely nominal parties to the proceedings.

As to Emergency Powers, see HALSBURY, Hailsham Edn., Vol. 23, pp. 464, 465, para. 683; and for Cases, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

Motion to set aside an order made by the registrar of the Manchester District Registry giving leave to institute proceedings for foreclosure. The facts are fully set out in the judgment.

George Maddocks for the plaintiffs.

Hon. Denys B. Buckley for the first defendant.

The second defendant was not represented.

Bennett, J.: This is a motion by Gower, one of two defendants, in proceedings brought against him and McAdam by the trustees of the Independent Order of Oddfellows Manchester Unity Friendly Society, to set aside an order made by the registrar of the Manchester District Registry on Nov. 7, 1939, whereby leave was given to the plaintiffs to proceed to foreclosure or sale of the property comprised in a legal charge, dated July 28, 1938. The legal charge was a charge on certain property with a registered title situated in the county of Middlesex, and it was given to secure a sum of £14,400 and interest thereon at 5 per cent. per annum. It was dated July 28, 1938. The borrower, the mortgagor, is the applicant in this motion. The charge provided for a payment of interest at the rate of 5 per cent. per annum on Jan. 28 and July 28 in each year, and for repayment of the principal sum of £14,400 by 60 equal half-yearly payments of £240 each, the first payment to be made on Jan. 28 then next.

The summons upon which the district registrar made his order was issued by the applicants on Oct. 17, 1939. The defendants are thus described—namely, the first defendant John Herbert Noel Gower as the mortgagor under the legal charge, and the second defendant, George Maisey McAdam, as a person interested in the equity of redemption under the legal charge. The relief sought was that the plaintiffs might be at liberty to institute proceedings to recover the debt and to enforce the legal charge by foreclosure or sale under the Courts (Emergency Powers) Act, 1939. The application before the registrar was supported by an affidavit of one Andrews, the secretary of the plaintiffs, who deposed to the fact that the legal charge had been made. In para. 3, he deposed to this fact:

> By a transfer dated Jan. 6, 1939, the property comprised in the said legal charge was transferred by the defendant, John Herbert Noel Gower, to the defendant George Maisey McAdam, subject to the said legal charge.

In para. 4, he deposed to the fact that there was owing to the plaintiffs upon the security of the charge a principal sum, together with arrears of interest, as follows:

> Half-year's interest, due Jan. 28, 1939, on £14,000 [the amount to which, by repayment of principal, the mortgage debt had then been reduced], £350, and half-year's interest, due July 28, 1939, on £14,000 at 5 per cent., £350.

That makes a total arrears of interest on July 28, 1939, of £700, and accruing interest from that date. On Apr. 18, one Fisher had been appointed by the plaintiffs receiver out of court.

McAdam filed no evidence, but Gower, the present applicant, filed an affidavit stating as follows:

> By a contract in writing between me this deponent and George Maisey McAdam, my co-defendant in this matter dated Nov. 25, 1938, I agreed to sell to the said George Maisey McAdam the premises comprised in the legal charge referred to in the originating summons herein conditionally on his being accepted as the mortgagor by the mortgagees, the plaintiffs in this matter, and my being released by the said mortgagees from all liabilities under the said legal charge. On Jan. 6, 1939, as the result of a letter received by my solicitors from the plaintiffs' solicitors, dated Dec. 20, 1938 . . . the said sale to my co-defendant was duly completed, and the proportion of interest due to the plaintiffs on Jan. 28, 1939, was allowed to the said George Maisey McAdam. I assumed, as I submit was not unreasonable, that the said George Maisey McAdam would have paid the said mortgage interest. Had the purchase not been so completed, the said mortgage interest would have been paid by me as it fell due. As appears from the said correspondence, the plaintiffs' solicitor duly prepared the appropriate deed of release, which was returned to him duly executed by the said George Maisey McAdam. The plaintiffs have failed to send me the part of the said deed intended to be retained by me, and it appears that the said George Maisey McAdam has never been registered at H.M. Land Registry as the registered proprietor of the premises comprised in the said legal charge, as the plaintiffs declined to lodge their charge certificate to meet the transfer of the said land.

He then goes into questions of fact for the purpose of establishing that he was unable, owing to circumstances attributable directly or indirectly to the present war, to satisfy the obligations under the legal charge. He never took the point in that affidavit that he was not a necessary party to the proceedings.

Before the registrar, in addition to the two affidavits to which I have referred, there was a third affidavit made by Mr. Blumberg, the solicitor for the plaintiffs, sworn on Nov. 6, 1939, in which he refers to the affidavits of Andrews and of the defendant Gower. He exhibited some letters, and in para. 3 he goes on to say:

> There is nothing in such correspondence to support the allegation in such paragraph [para. 2 of Gower's affidavit] that the agreement for sale by that defendant to his co-defendant was conditional upon the latter being accepted by the plaintiffs as mortgagor, nor have the plaintiffs any knowledge of any such condition as alleged. As appears from the said correspondence, the proposed deed of release of the defendant John Herbert Noel Gower was never executed by the plaintiffs for the reasons that the interest and instalment of principal due on Jan. 28, 1939, were not paid, and that by reason of the delays which occurred the said deed, as drawn and engrossed, required alteration.

Then in para. 4 of the same affidavit he says:

> I am of my own knowledge able to state that, prior to the outbreak of the present war, neither of the defendants had made any offer or proposal whatsoever to the plaintiffs with a view to the payment of the arrears of interest amounting to £700 due as mentioned in para. 4 of the affidavit of Herbert Arthur Andrews or of the instalments of £240 and £240 due in reduction of principal on Jan. 28 and July 28, 1939.

I do not think that there is any further fact in that affidavit to which it is necessary to refer, but that was the evidence before the registrar. Upon that, he gave to the plaintiffs leave to proceed for foreclosure or sale, or, rather, liberty to institute proceedings to enforce the legal charge by foreclosure or sale. It is to discharge that order that the present motion is made.

The first point taken by counsel for Gower is a point that was never taken before the registrar, and it is this. If one has regard to the fact that Gower, according to the evidence, has conveyed the equity of redemption to his co-defendant, McAdam, he is not a necessary party to an application under the Courts (Emergency Powers) Act, 1939, for leave to commence
A proceedings to enforce the security by foreclosure or sale, because he has no longer any interest in the security at all. I am not satisfied about the relationship between Gower and McAdam. According to the evidence, the contract between Gower and McAdam was a conditional one, conditional upon Gower being released by the plaintiffs from liability upon
B his covenants in the legal charge, and he never has been. I am not satisfied that Gower may not still have some such interest in the security as makes him a necessary party to an action to enforce the security by foreclosure or sale. The fact that the point was never taken when the matter was before the registrar raises a doubt in my mind about the
C whole of the relationship between them, and I am not prepared on that ground to interfere with the order which the registrar has made.

That leaves the question whether the applicant has discharged the onus which rests upon him of satisfying the court that, by reason of circumstances directly or indirectly attributable to the war, he is unable
D to perform the obligation which would entitle the plaintiffs to institute these proceedings for foreclosure or sale. The applicant has supplemented the evidence which was before the registrar by a further affidavit, sworn by him on Nov. 15, 1939, in which he enumerates the properties of which he was possessed, and of which, I suppose, he is still possessed,
E with a view to satisfying the court that, by reason of circumstances directly or indirectly attributable to the war, he was not, or is not, in a position to pay the debt. From that affidavit, it appears that he is the owner of certain parcels of freehold land, four of which are subject to substantial mortgages. The case he seeks to make is that, but for the war,
F he would have been able, out of the interests he has in those lands, to discharge the obligation which he undertook under the legal charge which the plaintiffs are seeking to enforce. I think that it is very largely a matter of speculation as to whether or not he would have been able, out of those properties, to have discharged the obligation which he
G undertook to the plaintiffs. The fact is that, before the war began, there was due from him to the plaintiffs two half-yearly payments of interest due under the mortgage, and two sums, each of £240, due from him in respect of principal, which ought to have been paid in Jan., 1939, and in July, 1939. The instalments of principal ought to have been paid
H in the same months, and were not. On the material before me, the applicant has not satisfied me that he was in a position, before the war began, to discharge his liability under the legal charge. Though no doubt his position is probably worse than it was, he has failed to satisfy me that his inability to perform the obligation is directly or indirectly attributable to circumstances arising out of the war. For these reasons,

in my judgment, the applicant has failed to satisfy me that the order made by the registrar was wrong, and the motion is refused with costs.

Motion refused with costs.

Solicitors: *Marco Blumberg*, Manchester (for the plaintiffs); *Timbrell, Deighton & Nichols* (for the first defendant).

A

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

Applied. R. *v.* Surrey Quarter Sessions Appeal Com. *Ex p.* Lilley. [1951] 2 All E.R. 659.

JENNINGS AND ANOTHER *v.* KELLY.

[House of Lords (Viscount Maugham, Lord Atkin, Lord Russell of Killowen, Lord Wright and Lord Porter), **October 10, 11, November 30, 1939.**] B

Intoxicating Liquors—Licence—New licence—Increase of 25 *per cent. of population—Whether increase relates to city or ward or district electoral division—Government of Ireland Act*, 1920 (*c.* 67), *s.* 49 (*a*) (*b*)—*Intoxicating Liquor Act* (*Northern Ireland*), 1923 (*c.* 12), *s.* 9 (*c*)—*Intoxicating Liquor and Licensing Act* (*Northern Ireland*), 1927 (*c.* 21), *s.* 3 (6) (iv). C

An applicant for a new licence for the sale of intoxicating liquor for consumption on or off the premises produced a statutory certificate showing an increase of population of not less than 25 per cent. in the ward of the city in which the premises were situate. The objectors contended that, under sect. 9 (*c*) of the Act of 1923, it was a condition precedent to the granting of a licence that there should be an increase of not less than 25 per cent. of the population of the city or town, but the applicant maintained that the requirements of the section were satisfied by such increase in population in the ward or district electoral division in which the premises for which the licence was sought were situate, and also that the appellants were not "persons aggrieved" by the decision of the Court of Appeal:— D E

Held: (i) the "increase of not less than 25 per cent. of the population" required by sect. 9 (*c*) of the Act of 1923 is an increase of population in the ward or district electoral division in which the premises sought to be licensed are situate.

(ii) the appeal was not incompetent, because the appellants were "persons aggrieved" by the decision of the Court of Appeal within the meaning of the statute. F

[**EDITORIAL NOTE.** The matters here considered are purely questions of construction of the particular statutory provisions in question. It has, however, been necessary in the course of the case to consider the proper function of a proviso, and its effect on the main provision of a section. The consideration of the meaning of the words "person aggrieved" is of importance, as these words so commonly occur in the statutory provisions relating to local government. G

As to Grant of New Licence, see HALSBURY, Hailsham Edn., Vol. 19, pp. 70-73, paras. 187-191; and for Cases, see DIGEST, Vol. 30, pp. 27-35, Nos. 173-274.]

Cases referred to: H

(1) *R.* v. *Belfast Recorder*, [1938] N.I. 10.

(2) *West Derby Union* v. *Metropolitan Life Assurance Society*, [1897] A.C. 647; 42 Digest 659, *680*; 66 L.J.Ch. 726; 77 L.T. 284; *affg.* S.C. *sub nom. West Derby Union Guardians* v. *Metropolitan Life Assurance Society, West Derby Union Guardians* v. *Priestman*, [1897] 1 Ch. 335.

(3) *R.* v. *Loxdale* (1758), 1 Burr. 445; 42 Digest 663, *731*.

(4) *Goldsmiths' Co.* v. *Wyatt*, [1907] 1 K.B. 95; 42 Digest 685, *992*; 76 L.J.K.B. 166; 95 L.T. 855.

(5) *Boulter* v. *Kent JJ.*, [1897] A.C. 556; 30 Digest 69, *548*; 66 L.J.Q.B. 787; 77 L.T. 288; *revsg.* S.C. *sub nom. R.* v. *Kent JJ.*, [1896] 2 Q.B. 306.

(6) *Sevenoaks Urban District Council* v. *Twynam*, [1929] 2 K.B. 440; Digest Supp.; 98 L.J.K.B. 537; 141 L.T. 566.

A

APPEAL from an order of the Court of Appeal in Northern Ireland, dated June 20, 1938, setting aside and discharging an order of the King's Bench Division (Crown Side), dated May 17, 1938. The facts and the arguments are set out in the opinion of VISCOUNT MAUGHAM.

B *H. J. Wallington, K.C.*, and *L. E. Curran* for the appellants.

Serjeant Sullivan, K.C., *Thomas J. Campbell, K.C.*, *James McSparran* and *Cyril Nicholson* for the respondents.

VISCOUNT MAUGHAM: My Lords, this is an appeal from an order C of His Majesty's Court of Appeal in Northern Ireland, dated June 20, 1938. The main point involved is the question of the true construction of a section of the Intoxicating Liquor Act (Northern Ireland), 1923—which I shall call the Act of 1923—a matter on which there has been in Northern Ireland a considerable difference of opinion, due, I think, D to the unfortunate way in which the section is drafted. There was also raised before your Lordships the question whether an appeal to this House was competent in this case, the contention of the respondents being that the appellants were not "parties aggrieved" by the decision of the Court of Appeal. The dispute relates to the granting of a licence E for the sale of intoxicating liquors in the city of Belfast. The facts are not in dispute, and may be shortly stated.

The appellant John Barnabas Jennings is a Methodist minister and the appellant Elijah Quincey is a retired merchant, and both the appellants are inhabitants of the parish of Knockbreda in the county of the F city or county borough of Belfast in Northern Ireland. The respondent, James Kelly, is a licensed vintner residing and carrying on business in the county of the city of Belfast. He applied under sect. 9 of the Act of 1923 for a licence for certain premises in the Ormeau ward of the city or county. The application was heard by His Honour JUDGE THOMPSON, G Recorder of Belfast, the licensing authority for the district. The appellants were present as objectors, and by their counsel opposed the application, on the ground that the conditions as to population required by the Act (which I shall state later) had not been complied with. An increase of not less than 25 per cent. in the population of Ormeau ward H was proved by the certificate of the Minister of Home Affairs for Northern Ireland, and in addition proof was given of the growth of the city of Belfast owing to such increase. The respondent admitted that the population of the city was, according to the census, 386,947 in 1911 (the year of the last census before the passing of the Act of 1923) and 415,151 in 1926—an increase of less than 25 per cent.—whereupon the recorder stated that he was bound by the recent decision of the King's Bench Division in *R.* v. *Belfast Recorder* (1) to hold that it was necessary to prove an increase of 25 per cent. in the population of the city. On Sept. 10, 1937, the recorder, after delivering a reasoned judgment, made the following order:

> It appearing that there has been an increase of population since the last census A ascertained next before the passing of the Licensing Act, 1923, (*a*) of less than 25 per cent. in the case of city of Belfast, and (*b*) of more than 25 per cent. in the case of Ormeau ward in which the premises proposed to be licensed are situate, and such increase being insufficient in law to warrant the granting of a certificate for a licence, refuse the application on that ground.

It should be added that the recorder in his written judgment pointed B out in very clear language the difficulties to which the decision of the King's Bench Division gave rise. The respondent then applied to the King's Bench Division for a conditional order for a writ of *certiorari* directed to the recorder to remove into the King's Bench Division his orders and adjudications in the matter for the purpose of quashing the C same. On Mar. 9, 1938, this order was refused.

The respondent then appealed to the Court of Appeal of Northern Ireland seeking a conditional order to the effect above stated, and on Apr. 25, 1938, the order of the King's Bench Division was discharged and the conditional order granted. The condition included the words: D

> . . . unless cause be shown to the contrary within 10 days after service of this order upon Samuel Henry, Esq., solicitor for [the appellants, and on certain officials].

The conditional order so granted was in its turn discharged by the King's Bench Division on May 17, 1938. From that order there was E again an appeal to the Court of Appeal, the notice of appeal being served on the solicitor for the appellants.

Upon the hearing of the appeal, the Court of Appeal (ANDREWS, L.C.J., and BEST and BABINGTON, L.JJ.) made an order, dated June 20, 1938, allowing the appeal and setting aside and discharging the order of F May 17, 1938, and making absolute the conditional order of *certiorari*, dated Apr. 25, 1938, notwithstanding cause shown, and further ordering, *inter alia*, that a writ of *certiorari* do issue directed to the Recorder of Belfast to remove into the King's Bench Division of the High Court of Justice in Northern Ireland for the purpose of being quashed, *inter* G *alia*, all and singular orders and adjudications of the recorder made at Belfast on Sept. 10, 1937, refusing the respondent's application for a certificate. The appellants were ordered to pay the costs to the respondent. It is from that order that the present appeal is brought. ANDREWS, L.C.J., dissented from BEST and BABINGTON, L.JJ., and H agreed with the decision of the King's Bench Division.

It will be desirable to set out in full the terms of sect. 9 (*c*) of the Act of 1923, though the whole section should be read, and it is desirable to bear in mind that the section—which replaced, as regards Northern Ireland, with certain alterations, an earlier Act of 1902 relating to all

Ireland—contained a prohibition of the granting of any fresh licences in Northern Ireland except in certain specified cases.

> Where owing to an increase of not less than 25 per cent. of the population according to the last census, there is a growth or an extension of any city or town, and the licensing authority is satisfied after hearing any evidence tendered to it by any resident or owner of property in such city or town that the restrictions in this section on the granting of licences may be relaxed, the licensing authority may grant a licence to any applicant notwithstanding that the same would be otherwise forbidden by this section.
>
> Provided that such licence shall be granted only for premises situate in the ward or district electoral division in which such increase of population has taken place, and in substitution for at least two existing licences held in respect of premises situate within the city or town (as the case may be) comprising such ward or district electoral division.

A question arose as to how the required increase in population should be proved, and, accordingly, by the Northern Ireland Intoxicating Liquor and Licensing Act, 1927, s. 3 (6) (iv), it was provided as follows:

> The required increase of population shall be proved by means of a certificate of the Minister of Home Affairs that he is satisfied that there has been an increase of not less than 25 per cent. since the census ascertained next before the passing of the Act of 1923.

Two points have been argued upon the appeal. The respondent has contended that the appeal should be dismissed as incompetent on the ground that the appeal to this House can only be justified under the Government of Ireland Act, 1920, s. 49 (*a*) (*b*), made applicable to Northern Ireland by the Irish Free State (Consequential Provisions) Act, 1922, s. 6 (3), Sched. I. The appellants, it was said, must therefore show that they are "persons aggrieved" by the decision of the Court of Appeal, and it was denied that they were. My Lords, I have found myself unable to accept this contention. Not only were the appellants persons who, in the various proceedings which I have above detailed, had been treated as objectors entitled to appear and be heard in the King's Bench Division and in the Court of Appeal, but also they had been ordered to pay the costs of the proceedings by the order under appeal to this House. On this point, however, I have had the advantage of reading the judgment of my noble and learned friend LORD WRIGHT, and I observe that he has completely dealt with it and with the arguments relied on by the respondent in support of it. I entirely agree with his view of this contention, and will therefore add nothing further of my own. The appeal, in my judgment, is a competent appeal.

The main point is that of the true construction of sect. 9 (*c*), which I have set out above. It is clear from the words of the proviso that the licence can be granted only if there has been an increase of not less than 25 per cent. of the population of the ward (I will omit the words "or district electoral division" for the sake of brevity) in which the application for a licence is being made. Is it also necessary that a second condition as to population should be satisfied—namely, that there must be an increase of not less than 25 per cent. in the population of the city or town? The Court of Appeal has by a majority answered this question

in the negative, and the recorder showed by his written judgment that he shared this view. However, as I have said, ANDREWS, L.C.J., and the judges of the King's Bench Division were for answering it in the affirmative. The section is in several respects curiously framed. It begins by requiring that there should be a growth or an extension of the city or town *owing to* an increase of not less than 25 per cent. of A
the population according to the last census. It is clear that such an increase requires a comparison between a previous and a subsequent number of the population, but this could not be ascertained merely by examining the last census before the Act of 1923. This difficulty is resolved by sect. 3 of the Act of 1927, which no doubt requires the B
Minister to make a comparison of the population ascertained at the last census before the Act of 1923, and of the existing population (presumably) at the date of the application for the licence. Plainly, from the words of the proviso, this certificate must apply to the increase in population of the ward, and the question is whether or not there must C
also be a certificate as to the increase in population of the city or town. Nor is it very easy to say what is meant by the words "a growth or an extension of any city or town." "Extension" seems to point to an extension in area, and, if so, "growth" would appear to mean a growth in population. If this is correct, and if growth refers to an increase in D
population of the city or town, there would seem to be considerable force in the observation that this might easily have been expressed by saying: "Where, owing to an increase of not less than 25 per cent. of the population of any city or town according to the last census or to its extension. . . ." Such an increase in population must obviously E
result in a growth (if not an extension) of the city or town. Why, then, provide that the growth or the extension must be due to the increase in population of the same area?

The licensing authority must also be satisfied by the evidence that the restrictions in the section on the granting of licences may be relaxed. F
The relaxation is, indeed, not of a very drastic character, since the total number of licences in the city or town will be reduced by one if the application is granted. It has been truly observed that, if the city or town has increased in population since the last census by not less than a quarter, there must necessarily be one or more wards in which G
there has been a similar increase. There might, however, be an enormous increase in population of a ward and yet an increase in population of the city by, say, only 20 per cent. It would seem strange, in a clause purporting to relax restrictions, to prohibit the granting of a fresh licence in such a ward, even though two licences were being given up H
in the rest of the city or town.

We must now come to the proviso, for there is, I think, no doubt that, in the construction of the section, the whole of it must be read, and a consistent meaning, if possible, given to every part of it. The words are:

. . . provided that such licence shall be granted only for premises situate in the

> ward or district electoral division in which such increase in population has taken place . . .

There seems to be no doubt that the words " such increase in population " refer to the increase of not less than 25 per cent. of the population mentioned in the opening words of the section. If those words indicate an increase of not less than 25 per cent. of the population of the city or town, then the required condition is that the population of the ward, if the words are given their ordinary meaning, must have increased by not less than one-quarter of the whole population of the city or town. This seems to me, as it seemed to the Lords Justices in the Court of Appeal, to reduce sect. 9 almost to a nullity, yet this is the construction which, as I understand it, found favour with the King's Bench Division. I will add that, if Parliament had intended so strange and improbable an event, I think that very different language would have been used. The obvious way of drafting the section, if both these conditions as to population were to be requisite, would be to couple them together, for example, by providing : " Where there has been an increase of not less than 25 per cent. of the population of any city or town according to the last census, and where an increase of not less than 25 per cent. of the same population is found to have taken place in any ward . . ." Moreover, if so large an increase in the population of a ward in a city should take place, it is a little difficult to see the necessity for evidence by residents or owners to show that the granting of licences in that ward might be relaxed.

Counsel for the appellants felt the force of these considerations, and preferred to contend, as they seem to have contended in the Court of Appeal, that the words " such increase " might be construed to mean " such percentage of increase " or " a similar increase." My Lords, this material change in the language used is very difficult to justify, and I can only say that I see no warrant for so altering the words. It is easy to understand that, if it is assumed as being beyond doubt that the introductory words in the section mean an increase of not less than 25 per cent. of the population of the city or town, then there would be ground for endeavouring to give an artificial meaning to the words " such increase " in the proviso in order that the section should have some practical effect, but that is an assumption which I am unable to accept. The curious phrasing of the section and the reference to the necessity for " a growth or extension " of the city or town suggest the necessity for an explanatory clause, and, reading the whole section together, it seems to me far easier to accept the view that the increase in population mentioned in the first lines of the section is an increase in the population of the ward as indicated in the proviso by the words : " the ward . . . in which *such* increase in population has taken place." No violence is done to the words by such a construction, and it is not a disadvantage to find that it seems to carry out a practice which has prevailed in Northern Ireland for a good many years.

In coming to his conclusion, ANDREWS, L.C.J., was influenced by his view that the first part of the section was the operative portion of it, and that the proviso could not properly be used to explain the words as to increase of population in the operative part. He therefore relied on the principle of construction to be found in *West Derby Union* v. *Metropolitan Life Assurance Society* (2). The principle is thus stated by LORD WATSON, at p. 652:

> . . . I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso.

I am sure that none of your Lordships would desire to depart from this principle where it is applicable—namely, where the enacting part of the section is unambiguous and complete and is followed by a true proviso (that is, a qualification or an exception out of it). In my view, that is not the case here, and, as LORD HERSCHELL pointed out in the *West Derby Union* case (2), at p. 655:

> Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or that, which is the proper view to take of it . . .

My Lords, that is precisely the method of construction which, in my view, is applicable in the present case. I will add that the words beginning "Provided that" are, in my opinion, additional and explanatory words, necessary for the purpose of giving a more definite meaning to the preceding words—namely, for the purpose of removing doubt as to its scope—and they might easily have been incorporated in the earlier part of the section, at the risk of making it rather more cumbrous than it is. We are not dealing here with a true proviso, or, at any rate, not with such a proviso as this House was considering in the *West Derby Union* case (2). It cannot, I think, be disputed that, in construing a section of an Act of Parliament, it is constantly necessary to explain the meaning of the words by an examination of the purport and effect of other sections in the same Act. A number of striking examples will be found in MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn., pp. 27, 28. This principle is equally applicable in the case of different parts of a single section, and none the less so because the latter part is introduced by the words "provided that," or like words. There can, I think, be no doubt that the view expressed in KENT'S COMMENTARIES ON AMERICAN LAW, 12th Edn., Vol. 1, p. 463, *n* (cited with approval in MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn., p. 140), is correct:

> "The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail."

My Lords, I have not thought it necessary to examine the sections of the earlier Act of 1902, because, if their construction is different from that of the Act of 1923, it is always possible, the words being different,

that the later Act is intended to amend the earlier one. This, of course, is not to say that, if the later Act is exactly *in pari materia* with the earlier one, the two statutes may not have to be taken and construed together as one system and as explanatory of each other: *per* LORD MANSFIELD in *R.* v. *Loxdale* (3), at p. 447, and *Goldsmiths' Co.* v.
A *Wyatt* (4). Nor have I placed reliance on the amending Act of 1927 in construing sect. 9 of the Act of 1923. I may observe, however, that the draftsman of the Act of 1927 seems to have thought that a certificate as to the population of only a single area was needed, and I cannot help thinking that, if the legislature had considered that in every case there
B had to be two inquiries and a certificate or certificates as to two increases of population, different language would have been used. For these reasons, my Lords, I think the judgments of BEST and BABINGTON, L.JJ., and, I will add, the doubts expressed by the Recorder of Belfast, were correct, and this appeal must be dismissed.

C LORD ATKIN: My Lords, I concur.

LORD RUSSELL OF KILLOWEN: My Lords, notwithstanding the division of judicial opinion which has existed in Northern Ireland, I have found the answer to the question in debate to be reasonably free
D from difficulty. The question is what is the true construction of the Intoxicating Liquor Act (Northern Ireland), 1923, s. 9 (*c*), and the answer depends upon the language used in that particular provision, which should, I think, be considered as it stands, and without reference to the Licensing (Ireland) Act, 1902, or any other alleged legislative
E ancestor.

I do not agree with the contention of the appellants, which appears in the second reason in their case:

> . . . it is not a right method of construction to use a proviso to control or alter the operative effect of the words preceding it.

F That is frequently the very function of a proviso—namely, to include within the scope of the preceding words something which *prima facie* would not fall within it, or to exclude something which *prima facie* would so fall. Although a proviso may well be incapable of putting upon preceding words a construction which they cannot possibly bear,
G it may without doubt operate to explain which of two or more possible meanings is the right one to attribute to them. Sect. 9 (*c*) seems to me a case in which the proviso tells you expressly in what sense you are to understand the preceding words: "an increase of not less than 25 per cent. of the population according to the last census." Until the
H proviso is read, it is not clear where the increase is to take place. Must there be a 25 per cent. increase in the population of the whole city or town, or will it suffice if there is a 25 per cent. increase in the population of some defined part of the city or town? The words preceding the proviso would *prima facie* point to the former view. One must, however, read the whole clause before attempting to construe any portion

of it, and a perusal of the proviso fixes the meaning of the words which precede it. It tells you where the increase of population has to take place—namely, in the ward or electoral division in which the premises proposed to be licensed are situate. The words " such increase of population " admit of no doubt. They are equivalent to " the increase of population above referred to "—that is, " an increase of not less than A
25 per cent. of the population according to the last census "—and they establish that the population in question is the population of the relevant ward or electoral division. For these reasons, I agree that this appeal fails, and should be dismissed with costs.

I agree, too, that, in view of the facts that the present appellants or B
their solicitors were served with the order of Apr. 25, 1938, and with the notice of appeal of May 20, 1938, and were ordered to pay the costs of that appeal, they were persons aggrieved by the order appealed from, and that an appeal lay to your Lordships' House.

C

Lord Wright: My Lords, the respondent James Kelly made application to His Honour Judge Thompson, Recorder of Belfast, as the licensing authority for the city of Belfast, that a new licence for certain premises in the Ormeau ward in the city should be granted to him. The recorder refused the grant of the licence, on the ground that D
he was bound to do so under *R.* v. *Belfast Recorder* (1), a decision of the High Court of Northern Ireland, though he indicated his personal disagreement with the reasoning of that decision. Before the recorder, the appellants appeared as objectors under the Excise Licences Amendment Act, 1833, s. 4, which gives a right to residents, *inter alios*, in the E
particular area to appear and object to the grant of a licence. The respondent then applied to the High Court for a conditional order for a writ of *certiorari* directed to the recorder to remove the order into the High Court. Notice of this application was served on the appellants. This application was refused by the High Court, but granted by the F
Court of Appeal, which ordered that, unless cause were shown to the contrary within 10 days after service of the order upon the solicitor for the appellants, the police, and the Clerk of the Crown and Peace for the county of Antrim, a writ of *certiorari* should issue to remove into the King's Bench Division the order of the recorder for the purpose of being G
quashed on the ground of error in law. The appellants, having filed an affidavit, appeared by counsel in opposition to the granting of the writ before the King's Bench Division, which discharged the conditional order with costs, to be paid by the respondent to the appellants. The respondent then appealed to the Court of Appeal, before whom the H
appellants appeared in support of the order in their favour, and were represented by counsel. The Court of Appeal by a majority, Andrews, L.C.J., dissenting, allowed the appeal, made the conditional order absolute, directed a writ of *certiorari* to issue to the recorder to remove his order into the King's Bench Division for the purpose of being

quashed, and ordered the appellants to pay the costs of the proceedings. The appellants appeal from this order to this House.

Before I deal with the substance of the appeal, it will be convenient first to dispose of the preliminary objection taken by the respondent, which is that the appeal is not competent. The right of appeal to this
A House from the Court of Appeal in Northern Ireland in proceedings by way of *certiorari* depends on the Government of Ireland Act, 1920, s. 49 (*a*) (6), as applied to Northern Ireland under the Irish Free State (Consequential Provisions) Act, 1922, s. 6 (3), Sched. I. In effect, it is thereby provided that only a "person aggrieved" by the order of the
B Court of Appeal in the proceedings in *certiorari*, *inter alia*, can appeal. It has been contended on various grounds that the appellants are not persons aggrieved. It is said that they have no peculiar or individual right or interest or grievance in respect of the order made by the recorder or the order made by the Court of Appeal in the proceedings by way of
C *certiorari*, because they are merely in the position of any other residents in the city of Belfast. It is also said that, so far as the order against which they are appealing orders them to pay costs, that does not constitute a grievance within the meaning of the section, that, even if it were, the only appeal which is competent is an appeal limited to the
D question of costs, and, further, that this House will not entertain an appeal solely on a question of costs. In my opinion, all these objections are ill-founded. The proceedings in which the appeal is brought are the proceedings by way of *certiorari*, not the proceedings before the licensing authority. In these latter proceedings, there could be no
E appeal, as was held in England (and the same rule applies in Northern Ireland) in *Boulter* v. *Kent JJ.* (5). The question is, however, whether the appellants were persons aggrieved under and in respect of the decision in the proceedings by way of *certiorari*. In order to see if they were persons so aggrieved, it is necessary to consider what their position was.
F The Court of Appeal, in granting the conditional order for *certiorari*, had directed that the order was to issue unless, within 10 days of service on the appellants, cause was shown to the contrary. The appellants, being duly served, appeared before the King's Bench Division and succeeded in showing cause to the contrary, and were awarded their
G costs. In appearing in these circumstances, they could not, in my opinion, be regarded as merely officious, quite apart from their right to object in the licensing proceedings under the Excise Licences Amendment Act, 1833, s. 4. Notice of appeal was then served upon them through their solicitor. They appeared, and were represented by counsel, before
H the Court of Appeal, but the appeal was allowed, and they were ordered to pay the costs of the proceedings, and the order of the King's Bench Division awarding them costs was set aside. No objection throughout was taken to the appellants taking the steps which they did in the *certiorari* proceedings. It is not necessary here to decide whether the mere fact that they had a statutory right to object in the proceedings

before the licensing authority would constitute them parties interested in the proceedings by way of *certiorari*. They were treated throughout, however, as competent parties in these proceedings. Notices were served upon them as being proper parties. Orders were made in their favour and against them. It would be strange indeed if, in these circumstances, they were debarred from seeking to have restored the order A
made in their favour by the King's Bench Division, or to secure a reversal of the adverse order of the Court of Appeal. It would not, I think, be right to treat the matter simply from the standpoint of costs, but, even if it were so treated, I think that the appellants should succeed on the preliminary objection. In my opinion, the appellants were clearly B
aggrieved by being ordered to pay costs, and their right of appeal was complete merely on this limited ground. The section, be it noted, does not expressly specify the extent or nature of the grievance required, or limit in any way the scope of the right of appeal if the party is aggrieved, but, if the order as to costs constitutes a sufficient grievance, it is clear C
that the question as to costs could not be decided without deciding on the merits of the case, and the House could not stultify itself by an inability to give full effect to its decision if it held, on the appeal, that the decision of the Court of Appeal was wrong. Nor is there any rule of this House that it will not entertain an appeal which goes only to costs. D
In *Boulter's* case (5), the quarter sessions had ordered the appellant to pay the costs of the hearing of the appeal to quarter sessions. He had objected before the justices, and the licence had been refused, but, on appeal, it was granted by quarter sessions, before which court he had not appeared. He applied for *certiorari* simply and solely in respect of the E
order to pay costs, and eventually, after failing in the Divisional Court and in the Court of Appeal, succeeded in this House, which held that quarter sessions had no power to order costs against Boulter.

Though *Boulter's* case (5) depended on jurisdiction, I think it is an authority that a person ordered to pay costs in a case before licensing F
justices in which he is an objector has sufficient interest to be entitled to apply for *certiorari*, though, as this House held in *Boulter's* case (5), he was not a party *in judicio* in the licensing proceedings, there being no *lis* or controversy *inter partes*, and no question of a decision for or against him. After Boulter obtained the conditional order for *certiorari*, and G
failed in the lower courts, this House entertained his appeal, though the sole question was the validity of the order for costs. I think that that decision sufficiently disposes of the argument put forward on behalf of the respondent—namely, that an adverse order for costs is not sufficient to constitute the appellants "persons aggrieved" under sect. 49— H
because I think that, if such an order is sufficient to justify an application for an order of *certiorari*, it is sufficient to justify a right of appeal under sect. 49. The same authority is sufficient to dispose of the contention that this House is debarred from entertaining an appeal which simply relates to costs, though no doubt in certain cases it may in its

discretion refuse to do so. In the present appeal, however, it is clear that, if it is competent at all, it raises questions of principle of considerable difficulty and importance, on which the courts in Northern Ireland have differed.

There is no direct authority on the words of the Act now in question, A and I do not find it very helpful to discuss in detail the various authorities under other Acts, in which the meaning in those Acts of the words "persons aggrieved" has been debated. Nor does any one of those cases deal with facts like the particular facts of the present case, where the appellants appeared before the licensing authority and made an B objection which they had a statutory right to make. Having succeeded in that objection, they were then served by order of the court in the *certiorari* proceedings, in which they at first succeeded, but failed in the Court of Appeal, which refused them an order for costs, and instead ordered them to pay costs. The case which is nearest in point appears C to me to be *Sevenoaks Urban District Council* v. *Twynam* (6), in which a Divisional Court held that a ratepayer who had duly exercised a statutory right to object to a proposal made by the Sevenoaks Urban District Council to acquire land under the Public Health Act, 1925, had a right of appeal as a person aggrieved under that statute, though he had no D personal or peculiar interest, or any interest beyond what flows from the fact that he was a ratepayer and a member of the public who had given a notice of objection, which he was entitled to give, and had failed. I think this decision was right. The facts of the present case are stronger than those in the *Sevenoaks* case (6).

E In my opinion, the preliminary objection fails, and I proceed to deal with the appeal. This involves the construction of the Intoxicating Liquor Act (Northern Ireland), 1923, s. 9 (*c*), which provides as follows:

> Where, owing to an increase of not less than 25 per cent. of the population according to the last census, there is a growth or an extension of any city or town, and the licensing authority is satisfied, after hearing any evidence tendered to it F by any resident or owner of property in such city or town, that the restrictions in this section on the granting of licences may be relaxed, the licensing authority may grant a licence to any applicant notwithstanding that the same would be otherwise forbidden by this section: provided that such licence shall be granted only for premises situate in the ward or district electoral division in which such increase in population has taken place, and in substitution for at least two existing licences held in respect of premises situate within the city or town (as the case G may be) comprising such ward or district electoral division.

With this must be read the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, s. 3 (6) (iv), which provides as follows:

> The required increase of population shall be proved by means of a certificate of the Minister of Home Affairs that he is satisfied that there has been an increase H of not less than 25 per cent. since the census ascertained next before the passing of the Act of 1923 . . .

The recorder's order stated as follows both the facts which he found and his conclusion:

> It appearing that there has been an increase of the population since the last census ascertained next before the Licensing Act, 1923, (*a*) of less than 25 per cent. in the

case of the city of Belfast, and (*b*) of more than 25 per cent. in the case of the Ormeau ward in which the premises proposed to be licensed are situated, and such increase being insufficient in law to warrant the granting of a certificate for a licence, refuse the certificate on that ground.

As already stated, in so finding, the recorder followed the decision in *Rainey's* case (1).

The question, therefore, is whether the "increase of not less than A
25 per cent. of the population" is to be in the city, or in the ward or district electoral division, or in both. I agree with the opinion of Best and Babington, L.JJ., which was also the opinion of the recorder, apart from the authority of *Rainey's* case (1), that the required increase of not less than 25 per cent. in the population which is intended is an increase B
in the population of the ward or district electoral division. So far as concerns the city or town itself, the required condition is, in my opinion, that there should have been a growth or extension of the city or town owing to an increase of not less than 25 per cent. in population of a ward or district in which it is sought to secure the new licence. This latter C
condition was admittedly satisfied in the facts of the present case, and I do not further discuss it.

The difficulty which is undoubtedly involved in construing the section, and which led to the conclusion of Andrews, L.C.J., and of the King's Bench Division in *Rainey's* case (1), arises from the want of precision D
in the first part of sect. 9 (*c*), which does not define what "the population" intended is. If the section stopped before the second part which is introduced by the word "provided," it might well have been held, by way of supplying the want of definition, that it was "the population" of the city or town which was intended, because nothing else was E
mentioned in that part of the section. The crucial matter of debate has been whether the question can be so concluded. In my opinion, it cannot. The section must be construed as a whole. The second part of the section must be taken into account (whether or not it is properly called a proviso) in order to ascertain the true effect of the first part. If F
that is done, it follows, in my opinion, that the want of precision or the ambiguity which there is in the first part regarding the definition of "the population" is made good by the words in the second part: "the ward or district electoral division in which such increase of population has taken place." The words "such increase" necessarily refer back G
to "the increase of not less than 25 per cent. of the population," and define what is left undefined in the earlier words of the section. The ambiguity is thus cleared up. I question if any doubt on the point would have arisen if the paragraph introduced by "provided" had appeared simply as a second or supplementary subdivision of sect. 9 (*c*). The H
first part, as it stands, is incomplete by itself, because it does not state the conditions and limitations which are contemplated as applying to the relaxation of the restrictions on the granting of the licence. The second part of the section condescends to particulars, and, in doing so, defines the precise meaning of the population in regard to which the

increase is required. "Such increase in population" must refer back to something which has preceded, and that can only be "such increase" as already mentioned, and this is now defined. If it merely meant any increase of not less than 25 per cent., the joint effect of the two provisions might be that the required increase must be found both in the city or town and in the ward, or it might be that the increase of 25 per cent. in the city, which, on this construction, is referred to in the first part, would have to be found in the ward or district. Either construction would be very difficult as a matter of words. Perhaps the latter, merely as a matter of words, is less difficult, but, as a matter of substance, it is practically inconceivable. In Belfast, there are 15 wards. There were in the city, according to the 1911 census, 386,947 inhabitants, and, in 1926, there were 415,151 inhabitants (these being the relevant dates for comparison). It would indeed be startling if a ward which showed an increase of 25 per cent. on its own population were denied its claim to a further licence simply because it did not show an increase in its own population amounting to 25 per cent. on the total population of the city at the 1911 census—that is, an increase of more than 96,000 inhabitants. The manifest purpose of the section, which is to prevent an increase in the number of licensed premises, while satisfying the proper requirements of growing districts, is satisfied if the relaxation of the prohibition against new licences is based on the expanding population of the ward in question. This would not increase, but would in fact decrease, the number of actual licences, as two licences must be surrendered from the city or town before the grant of the new licence in the ward in which the increase has taken place.

The contrary construction favoured by ANDREWS, L.C.J., seems to be mainly based on a technical rule said to apply to the construction of a proviso. It is said that, where there is a proviso, the former part, which is described as the enacting part, must be construed without reference to the proviso. No doubt there may be cases in which the first part is so clear and unambiguous as not to admit in regard to the matters which are there clear any reference to any other part of the section. The proviso may simply be an exception out of what is clearly defined in the first part, or it may be some qualification not inconsistent with what is expressed in the first part. In the present case, however, not only is the first part of the section deficient in express definition, but also the second part is complementary and necessary in order to ascertain the full intention of the legislature. The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest. I do not think that there is any other rule, even in the case of a proviso in the strictest or narrowest sense, and still less where, as here, the introduction of the second part by the word "provided" is, in a strict sense, inapt. I think that this construction is also in conformity with the provision in the later Act of 1927 which deals with proof of "the required increase in population," though I do not seek to construe an earlier statute by a subsequent statute. The later Act, however, seems to contemplate a single increase, not a double increase, or two increases in population. A single increase is what, in my opinion, the 1923 Act requires, and, indeed, this is in accordance with what practical common sense would think that the situation A required. I agree with the order of the Court of Appeal, which, in my opinion, should be affirmed, the appeal being dismissed with costs.

Viscount Maugham: My Lords, I am asked by my noble and learned friend Lord Porter to say that he concurs with the opinions B which have been delivered.

Appeal dismissed with costs.

Solicitors: *Russell & Arnholz*, agents for *Samuel Henry*, Belfast (for the appellants); *C. Grobel, Son & Co.*, agents for *Joseph Donnelly & Co.*, Belfast (for the respondent). C

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

SOWLER *v.* POTTER AND OTHERS.

[King's Bench Division (Tucker, J.), **November 3, 6, 23, 1939.**] D

Landlord and Tenant—Lease—Mistake as to identity of lessee—Fraudulent misrepresentation by lessee—Lessor's right to avoid lease.

Mistake—Mistake as to identity of lessee—Mistake induced by fraudulent misrepresentation by lessee—Lessor's right to avoid lease.

On May 12, 1938, the defendant, whose name was then Ann Robinson, E was convicted of permitting disorderly conduct in a tea-room. On July 4, by deed poll, she assumed the name of Ann Potter. However, on June 16, 1938, she had written to the plaintiff's agent under the name of Ann Potter, offering to take a lease of certain premises belonging to the plaintiff, and on Aug. 4, 1938, the plaintiff purported to lease these premises to the defendant for use as a restaurant or tea-room. The plaintiff subsequently discovered that the defendant F Ann Potter was in fact Ann Robinson, who had been convicted of permitting disorderly conduct in a tea-room, and she thereupon brought proceedings claiming possession of the premises, a declaration that the lease was void, and damages for trespass and/or use and occupation and fraudulent misrepresentation on the grounds that there had been a mistake as to the identity of the person with whom the lease was G made, and that this mistake was brought about by the fraud of the defendant in concealing her identity and in fact representing that she was a person other than she really was:—

Held: (i) this was a case where the consideration of the identity of the person with whom the contract was made was a vital element in the contract.

(ii) there had been such a mistake as to render the contract void H *ab initio.*

(iii) the mistake had in fact been brought about by the fraud of the defendant. Her change of name had been a mere device to deceive the landlord with whom she was proposing to enter into a contract.

[EDITORIAL NOTE. It is well-settled that, to make a contract void by reason of a mistake in the identity of one of the parties, it must be shown that the contract would not have been entered into with that party had his true identity been known. In the present case, the identity of the contracting party was able to be hidden by a perfectly legitimate change of name, but it is still held that the contract is void *ab initio*.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 224,
A 225, paras. 245, 246; and FOR CASES, see DIGEST, Vol. 31, pp. 150, 151, Nos. 2858-2864.]

Cases referred to:

(1) *Lake* v. *Simmons*, [1927] A.C. 487; 35 Digest 97, *64*; 96 L.J.K.B. 621; 137 L.T. 233.

B (2) *Smith* v. *Wheatcroft* (1878), 9 Ch.D. 223; 35 Digest 98, *71*; 47 L.J.Ch. 745; 39 L.T. 103.

(3) *Phillips* v. *Brooks, Ltd.*, [1919] 2 K.B. 243; 39 Digest 533, *1451*; 88 L.J.K.B. 953; 121 L.T. 249.

(4) *Gordon* v. *Street*, [1899] 2 Q.B. 641; 35 Digest 44, *393*; 69 L.J.Q.B. 45; 81 L.T. 237.

C ACTION for possession of certain premises known as 74, Coleman Street, in the city of London, and mesne profits and damages on the basis of a breach of covenant in the tenancy agreement. The third defendant was not served. The pleadings were subsequently amended as the result of an application to strike out the statement of claim, and
D the action now claims a declaration that a lease entered into between the plaintiff and the first defendant, dated Aug. 4, 1938, is void *ab initio*, and for damages for trespass and/or use and also claims against both defendants for damages for fraudulent misrepresentation.

G. Granville Sharp for the plaintiff.

E *D. Weitzman* for the first and second defendants.

TUCKER, J.: In this case, Mrs. Sowler acted throughout in this matter through her agents, Messrs. Dron & Wright, house agents, and through them she came into touch with the defendant Ann Potter, as
F a result whereof she let, or purported to let, by means of a lease, dated Aug. 4, 1938, these premises at Coleman Street for the purposes of being used by the defendant as a restaurant or tea-room in the basement of the premises.

It appears, and it is a fact—it is admitted on the pleadings—that the
G defendant Ann Potter, whose name was then Ann Robinson, was on May 12, 1938, convicted at the Guildhall Police Court of permitting disorderly conduct in a café known as the Swan Café, Great Swan Alley, in the city of London, and was then fined therefor. When the plaintiff's agent got into touch with the defendant Ann Potter, the defendant wrote
H a letter, dated June 16, 1938, as follows:

> *Re* my conversation with you on the telephone this morning, I am prepared to make an offer of £210 per annum for the basement in Coleman Street previously Axe Café. Will you please let me know as soon as possible.

That is written from "Stortford," Cedars Close, Parsons Street, Hendon. At that time, Ann Potter was not the defendant's name. Her name was Ann Robinson, but subsequently, by deed poll, dated July 4, 1938, she duly changed her name from Ann Robinson to Ann Potter. When it was discovered later that the defendant Ann Potter was in truth and in fact Ann Robinson, who had been convicted of allowing disorderly conduct in a tea-room in the city of London, these proceedings were taken to recover the premises and subsequently to have it declared that the lease is void. The way the case is put on behalf of the plaintiff is this. It is said that the plaintiff, through her agent, was mistaken with regard to the identity of the person with whom the lease was made. It is furthermore said—though this would not be essential to that part of the case—that in fact that mistake was brought about by the fraud of the defendant Potter in concealing her identity and in fact representing that she was a different person from that which she was. Accordingly, it is said that the lease is void *ab initio*, and everything that has been done thereunder is also void, and that the defendant was at all times a trespasser and must be dealt with as such. That part of the case raises considerations which are not free from difficulty. I think that the law on the subject is to be found set out in the opinion of Viscount Haldane in *Lake* v. *Simmons* (1), at p. 501:

> Jurists have laid down, as I think rightly, the test to be applied as to whether there is such a mistake as to the party as is fatal to there being any contract at all, or as to whether there is an intention to contract with a *de facto* physical individual, which constitutes a contract that may be induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. Pothier (*Trait des Obligationé*, sect. 19), lays down the principle thus, in a passage adopted by Fry, J., in *Smith* v. *Wheatcroft* (2) [p. 230]: "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand." In the careful judgment delivered by him in *Phillips* v. *Brooks, Ltd.* (3), Horridge, J., decided that the alternative view secondly stated by Pothier applied to the case he was dealing with. A fraudulent person had entered a jeweller's shop and looked at and selected certain jewels which the jeweller was prepared to sell to him individually as a casual customer who had entered the shop. All that remained to be subsequently arranged was payment of the price. The unknown customer, who drew a cheque pretending to be someone else, and signing it in a well-known name, was allowed in exchange for the cheque to take away one of the jewels, of which he disposed subsequently. Horridge, J., found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was therefore consensus with the person identified by sight and hearing, although the title to delivery was voidable as having been induced by misrepresentation. In the other type of case referred to by Pothier, where the belief of the contracting seller depends wholly on identity of character or capacity, there is, as Holmes, J., says at the beginning of the ninth lecture in his book on The Common Law, no contract, because there is really only one party.

I think it is clear that this case with which I am dealing is one where, in the words used by Viscount Haldane in *Lake's* case (1), at p. 501:

> . . . the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make . . .

It is to be distinguished from the type of case with which Horridge, J.,

was dealing in *Phillips* v. *Brooks, Ltd.* (3), where those considerations did not arise. I think that this case of landlord and tenant is clearly a case where the consideration of the person with whom the contract was made is a vital element in the contract, and that, therefore, if there is any mistake with regard to the identity of the person with whom one
A is contracting, the contract is void *ab initio.*

Here, I think, there was mistake in regard to the identity of the person, for the reason that the agent acting on behalf of the plaintiff said in his evidence that he remembered the case of Mrs. Robinson having been reported in the newspapers. Therefore, he was
B aware that there was in existence a Mrs. Ann Robinson, a convicted person, and he thought when he entered into this contract with the defendant Potter that he was entering into a contract with some person other than the Mrs. Ann Robinson who had been convicted. I think it is quite immaterial to embark upon speculation as to whether or not,
C if she had called herself Mrs. Robinson, he would have discovered who she was. I think that that is another matter altogether. He believed that, whoever it was with whom he was contracting, it was not the Mrs. Ann Robinson who had been convicted of this offence a very short time beforehand. I think that the facts are, therefore, very similar to the
D facts in *Gordon* v. *Street* (4). It is quite true that the decision of the three members of the court in that case was that the fraudulent concealment by the plaintiff of his identity as a person whose reputation in business was such that the defendant would not have dealt with him was material to the inducement which brought about the contract,
E which the defendant was, therefore, entitled to repudiate within a reasonable time after the discovery of the fraud. The headnote in that case shows that the decision of three Lords Justices was based upon the fact that the defendant was entitled to repudiate this contract on the ground of fraud, but A. L. SMITH, L.J., after quoting that passage from *Smith*
F v. *Wheatcroft* (2) which was referred to by VISCOUNT HALDANE in *Lake's* case (1), says, at p. 647:

> Now, the advertisement above-mentioned points out that George James Addison, with whom the defendant thought he was contracting, was not as ordinary loan offices were, and that he traded at one-tenth of the interest charged elsewhere, and this appears to me to afford evidence that with a man trading as Addison said he
> G did the defendant was willing to contract, and that the consideration of the person did enter into the contract, and upon this ground, apart from fraud, the contract ought not to stand.

It is to be observed in this case that the defendant was aware of the existence of a notorious moneylender named Gordon, and, when he made
H the contract with the plaintiff in the name of Addison, he thought he was not contracting with a known person called Gordon of whose existence he was aware. In those circumstances, there being the fraud as well, A. L. SMITH, L.J., based his decision on the ground that in any event the contract could not stand, because, apart from fraud, there was this element of mistake with regard to the identity of the person

with whom the defendant was contracting. I think that that position is very similar to that in the present case, and, therefore, I think that in this case there was such mistake as to render this lease void *ab initio.* I furthermore hold, although it is not material to this part of the case, or not essential to this part of the case, that the mistake was in fact brought about by the fraud of the defendant Ann Potter. It is perfectly A true that everyone is permitted in this country for innocent reasons to change his name, but it must all depend on the circumstances. I am satisfied here that this was a mere device on the part of the defendant to deceive the landlord with whom she was proposing to enter into a contract, and she in fact fraudulently misrepresented her identity both B before and afterwards. That is to say, she described herself as Ann Potter at a time when she was not Ann Potter at all, and I think that, even if she had by that time changed her name by deed poll, it would not have made any difference, provided her intention was, as I hold it to have been, at all times to deceive the plaintiff for the purpose of C inducing her to enter into a contract with her into which she well knew the plaintiff would not have entered had she known who the defendant really was. That is sufficient for the decision on the claim with regard to the lease. I think that the plaintiff is entitled to a declaration that this lease, dated Aug. 4, 1938, of 74, Coleman Street, was void *ab initio.* D

There is a further claim for damages for trespass and use and occupation. With regard to that, the evidence before me is not very satisfactory, but the defendant has sworn, and there is no proper evidence to the contrary, that she has in fact paid the rent—or what would have been rent if there had been a valid agreement—up to the time when she E left these premises in Mar., 1939. Of course, if she had not paid anything, she would have had to pay damages on the basis that she was a trespasser, and such damages would probably have been based upon a figure representing what would have been a fair rent for the premises. However, she has in fact paid that, and, therefore, under that head, I F cannot see that the plaintiff can obtain any further damages on that basis, except for one small sum. Evidence has been given that a small sum of £8 is required to remedy the decorations in these premises. I think that that was brought about by the presence of the defendant Potter, who was in law a trespasser, and that that sum the plaintiff is G entitled to recover.

There is a further claim on this head—or rather, I suppose, based upon the fraudulent misrepresentation—that the plaintiff is entitled also to get the sum of £25 which she says is payable to the house agents who brought about this lease. With regard to that, I have found this lease H to be void. It would, therefore, appear at any rate highly doubtful whether a house agent can get commission for bringing about a void letting. It is not necessary for me to decide that. All it is necessary for me to say is that no evidence has been given before me which shows that, in the circumstances of this case—namely, a void lease having been brought about—the house agents are entitled to any commission. It may be that they had some contract with the plaintiff of which I am not aware, and which was in such terms that they would be entitled to get the £25 for bringing about a lease which turned out to be void. If so, they will no doubt be able to recover the £25, but I have no evidence before me to show that, in the circumstances of this case, they are entitled to get the £25. There is some suggestion that part of the damages might also be something that had been paid to some detective to discover the defendant's identity, but I am not satisfied with regard to that, and furthermore I think that the detective was employed principally for the purpose of discovering whether there had been any improper conduct in the premises after the defendant had gone in there. With regard to that, evidence was called before me the materiality of which I think was very doubtful at all times, although, I suppose, it might have thrown some light on the fraudulent intention of the defendant in taking these premises. However, it is not necessary for me to say more than that that evidence failed to satisfy me that there had in fact been any disorderly conduct in the premises after the defendant had gone there. The evidence was very vague and, I thought, unsatisfactory, especially having regard to the fact that I think the witnesses were all expecting to find something improper, knowing or suspecting who the defendant was, and what her past had been, and, therefore, were very liable to put the worst possible complexion on anything they saw happening in the basement. I am not satisfied that that was made out. So much for the case against the defendant Ann Potter.

With regard to the defendant Hopfenkopf, the position is this. He was referred to for a reference before this lease was granted. This was the letter that was sent to him by the house agents:

> Mrs. A. Potter, of "Stortford," Cedars Close, Parsons Street, Hendon, N.W.4, is negotiating with us for premises at a rental of £250 per annum inclusive, and she has given us your name to whom we may apply for a reference. We shall be glad, therefore, if you will kindly let us know for our client's information whether you consider she is likely to prove a respectable and desirable tenant and fully responsible for the rental named. We enclose herewith a stamped addressed envelope, and, as the matter is urgent, we shall be obliged if you will kindly let us have your reply by return of post.

Mr. Hopfenkopf's reply, dated July 14, was as follows:

> In reply to your inquiry about Mrs. A. Potter, of "Stortford," Cedars Close, Parsons Street, Hendon, N.W.4, I have pleasure to inform you that I know this lady for at least 12 years, and have no hesitation in recommending her as a respectable and desirable tenant, and fully responsible for the rental named.

The fact is that, when Mr. Hopfenkopf wrote that letter, he knew perfectly well that, two months before, this lady had been convicted of this offence, and I have no doubt whatever that he knew perfectly well that no landlord would regard her as either a respectable or a desirable tenant, that he deliberately wrote what he knew perfectly well to be untrue for the purpose of deceiving the person who received the letter, and that it had that effect. He now comes before me and says that, despite the conviction, he had accepted the lady's explanation that really all these things had been done without her knowledge at the tea-room, and that he thought she always was a respectable peron. I cannot accept that explanation, and I think, however charitably minded he was towards the lady, whom he had known for 12 years, and in whose house he was living, he knew perfectly well that no landlord would regard her as either a respectable or a desirable tenant, and that was the thing which mattered. I think that he made a fraudulent misrepresentation, for which he is responsible if any damages have flowed from it. There again, however, he is in an extremely fortunate position in this case, because I am unable to find that any damage has flowed from that except with regard to this £8, which I think is damage which resulted from letting this Mrs. Potter into the premises. I am unable to find any other damage which resulted from this misrepresentation. In arguing the case, counsel for the plaintiff has not contended that the plaintiff is entitled to any damages accruing after the date at which Mrs. Potter went out of the premises in March.

Therefore, the result is that I make a declaration that the lease was void *ab initio*, and I award the plaintiff against the defendant Mrs. Potter the sum of £8 for damages, on the basis of trespass and fraudulent misrepresentation, the one sum under both causes of action, and against the defendant Hopfenkopf, for fraudulent misrepresentation, the same sum of £8 damages.

Solicitors: *Pinsent & Co.* (for the plaintiff); *Bernard Simmonds & Co.* (for the first and second defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

MYERS *v.* ELMAN.

[House of Lords (Viscount Maugham, Lord Atkin, Lord Russell of Killowen, Lord Wright and Lord Porter), **October 18, 19, 23, 24, 25, 26, 30, December 5, 1939.**]

Solicitor—Alleged unprofessional conduct—Conduct of case left to managing clerk—Inadequate affidavits of documents—False to knowledge of clerk—Whether solicitor can be made personally responsible for costs.

The present respondent had been the solicitor on the record to one of the defendants. At the close of the case, the plaintiff made an application that the respondent should be ordered to pay the costs of the action, on the ground that he had been guilty of unprofessional conduct. It was proved that the respondent had left the conduct of the case in the hands of his managing clerk, who was not a solicitor. It was alleged that the respondent had been guilty of unprofessional conduct in that (i) he had filed a defence putting the plaintiff to the proof of her allegations, knowing that the defence was unlikely to succeed, and (ii) he had prepared affidavits of documents which no solicitor could help knowing were inadequate:—

Held: (i) (Lord Russell of Killowen dissenting) the respondent's managing clerk had knowingly prepared affidavits of documents which were inadequate.

(ii) in the circumstances, the respondent was guilty of misconduct, because, as a solicitor, and as an officer of the court, he could not escape his responsibility to the court for the proper discharge of his duties to the court by delegating them to a managing clerk who was not personally amenable to the jurisdiction exercised by the court over solicitors as its officers.

per LORD ATKIN: the court is not concerning itself with a breach of duty to the other litigant, but with a breach of duty to itself. Its jurisdiction is punitive, and is exercised in appropriate cases and in appropriate measure where there has been no personal complicity by the solicitor charged.

Order of Court of Appeal ([1938] 3 All E.R. 498) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal held by a majority that the punitive powers of the court over solicitors are only exercisable when the solicitor himself has been guilty of some misconduct, and that misconduct by a clerk which cannot be brought home to the solicitor himself, does not render the solicitor subject to the inherent jurisdiction of the court. This view has been unanimously reversed by the House of Lords, the opinion of LORD RUSSELL OF KILLOWEN, so far as it dissents from the majority, being confined to a question of fact.

AS TO LIABILITY OF SOLICITOR TO PAY COSTS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 269-272, paras. 290, 291; and FOR CASES, see DIGEST, Vol. 42, pp. 337-353, Nos. 3810-4022.]

Cases referred to:

(1) *Re A Solicitor, Ex p. Law Society*, [1912] 1 K.B. 302; 42 Digest 399, *4515*; 81 L.J.K.B. 245; 105 L.T. 874.

(2) *Re Jones* (1870), 6 Ch. App. 497; 42 Digest 352, *4010*; *sub nom. Fielden* v. *Northern Ry. of Buenos Ayres Co., Ltd., Re Jones*, 40 L.J.Ch. 113; 23 L.T. 655.

(3) *White* v. *Washington* (1738), Barnes 411; Cooke, Pr. Cas. 152; 42 Digest 352, *4006*.

(4) *Fowke* v. *Horabin* (1739), Barnes, 11.

(5) *Norton* v. *Cooper, Re Manby & Hawksford, Ex p. Bittleston* (1856), 3 Sm. & G. 375; 42 Digest 342, *3864*; 26 L.J.Ch. 313; 29 L.T.O.S. 378.

(6) *Dunkley* v. *Farris* (1851), 11 C.B. 457; 42 Digest 343, *3886*.

(7) *Re Eyre, Palmer* v. *Evans* (1856), 1 C.B.N.S. 151; 42 Digest 353, *4017*; 28 L.T.O.S. 125.

(8) *Stephens* v. *Hill* (1842), 10 M. & W. 28; 42 Digest 394, *4420*; 11 L.J.Ex. 329.

(9) *Blundell* v. *Blundell* (1822), 5 B. & Ald. 533; 42 Digest 345, *3902*.

(10) *Re Gray, Ex p. Incorporated Law Society* (1869), 20 L.T. 730; 42 Digest 403, *4569*.

(11) *Re Davies* (1898), 14 T.L.R. 332; 42 Digest 404, *4593*.

(12) *Brendon* v. *Spiro*, [1938] 1 K.B. 176; [1937] 2 All E.R. 496; Digest Supp.; 107 L.J.K.B. 481; 157 L.T. 265.

(13) *Re Ward* (1862), 31 Beav. 1; 42 Digest 351, *3993*.

(14) *Yonge* v. *Toynbee*, [1910] 1 K.B. 215; 42 Digest 335, *3785*; 79 L.J.K.B. 208; 102 L.T. 57.

(15) *Simmons* v. *Liberal Opinion, Ltd., Re Dunn*, [1911] 1 K.B. 966; 42 Digest 343, *3874*; 80 L.J.K.B. 617; 104 L.T. 264.

APPEAL by the applicant (the plaintiff in the action) from an order of the Court of Appeal (GREER and SLESSER, L.JJ., MACKINNON, L.J., dissenting), dated July 11, 1938, and reported, *sub nom. Myers* v. *Rothfield*, [1938] 3 All E.R. 498, reversing an order of SINGLETON, J., dated May 13, 1938, ordering the respondent to pay part of the costs of the action. The facts and the arguments are set out in the opinions of their Lordships.

R. A. Willes and *G. B. Croasdell* (for *L. H. Gluckstein* on war service) for the appellant.

T. F. Davis and *T. J. F. Hobley* for the respondent.

A

VISCOUNT MAUGHAM: My Lords, this is an appeal by the applicant (who was the plaintiff in the action) against a judgment of the Court of Appeal, dated July 11, 1938, allowing the appeal of the respondent (who was the solicitor on the record for two of the defendants in the action—namely, Henry Isaac Rothfield and Nathaniel Rothfield) against B an order of SINGLETON, J., dated May 13, 1938, whereby the judge ordered the respondent to pay to the applicant one-third of the taxed costs of the action and also two-thirds of the costs of the application against the respondent and other solicitors, such costs to be taxed. The questions raised by the appeal are whether, in the circumstances, C the respondent was guilty of professional misconduct, whether the judge misdirected himself in holding that the respondent was guilty of professional misconduct, and whether there was any jurisdiction to order the respondent to pay costs to parties for whom he was not acting as solicitor in so far as the conduct complained of was committed, not by D him, but by his managing clerk, Osborn, who was not a solicitor.

The writ in the action was issued on Nov. 3, 1936. The respondent accepted, on behalf of the defendants Henry Isaac Rothfield and Nathaniel Rothfield, service of the writ and of the statement of claim which was delivered therewith. The plaintiff's claim, as set out in the E statement of claim, alleged that the defendants were conducting a systematic swindle by means of a bogus and fraudulent business carried on as Horwood & Co., and alleged that various fraudulent misrepresentations were made whereby the plaintiff had been defrauded of various sums and securities amounting to £9,560 2*s*. The details F of the fraud will be stated by my noble and learned friend LORD WRIGHT.

The defendants in addition to Henry Isaac Rothfield and Nathaniel Rothfield were Norman Baron Rothfield, a firm sued as Rothies, and, lastly, the firm of Horwood & Co. The service of that firm resulted in G the appearance of one Morser, who was served as a partner in that firm. Owing largely to difficulties with regard to discovery, the action could not be brought to trial until Mar. 7, 1938. Though Norman Baron Rothfield was the only defendant who actually appeared and disputed the claim, the trial of the action lasted five full days. The jury's verdict H in favour of the plaintiff awarded her £9,400 damages for fraudulent conspiracy, for which judgment was entered against all the defendants with the costs of the action. It is stated that nothing could be recovered from any of the defendants. Immediately after such judgment had been entered, counsel for the plaintiff invited the judge, in the light of the evidence and of the facts disclosed relating to the conduct of the solicitors appearing on the record for the respective defendants, to exercise the court's jurisdiction over its officers, and to order and direct such solicitors to pay the costs so recovered from their respective clients, on the ground that such solicitors and each of them had been guilty of professional misconduct as officers of the court in conducting the defences of their clients.

The judge directed notice to be served on the solicitors of the grounds of complaint against each of them respectively, and, this having been done, he re-heard the application, and, holding that there was not sufficient justification for an order against one of the solicitors concerned, directed an inquiry into the conduct of three other solicitors, one of whom was the present respondent, which, after further and elaborate particulars had been delivered, was specially fixed to be heard by the judge on the first day of the following sittings, Apr. 26, 1938. The hearing lasted for five days. The judge, in addition to the evidence he had heard during the trial, heard the evidence of the plaintiff's solicitors' managing clerk. He also heard the evidence of Elman (the respondent) and of Osborn, his managing clerk. He had before him a considerable correspondence between Elman and his clients which the appellant's advisers had not previously seen. In his considered judgment, SINGLETON, J., held that Elman was not guilty of professional misconduct in filing defences which put in issue the charges of fraud made against his clients, but, finding that both Elman and his clerk, between whom he found himself unable to draw any distinction, "knew a good deal about the matters in question," and that they had, "as the result of a deliberate policy adopted in Elman's office," in the conduct of the defence, and in relation to discovery, "increased the plaintiff's difficulties, added to the expense, and obstructed the interests of justice," he held Elman guilty of professional misconduct as a solicitor and an officer of the court, and he made the order stated above. The respondent appealed to the Court of Appeal against the order of SINGLETON, J., and, by an order dated July 11, 1938, the Court of Appeal by a majority rescinded the order. GREER and SLESSER, L.JJ., were in favour of allowing the appeal. MACKINNON, L.J., agreed with SINGLETON, J., but expressed the view that his order erred on the side of leniency.

My Lords, as I understand the judgments of GREER and SLESSER, L.JJ., they were of opinion that the jurisdiction of the court to order a solicitor to pay the costs of proceedings is a punitive power, resting on the personal misconduct of the solicitor, and precisely similar to the power of striking a solicitor off the rolls or suspending him from practice. If this is a correct view, no doubt it would follow that the solicitor ought not to be ordered to pay costs unless he has himself been guilty of disgraceful conduct, and it would follow that, however negligent or obstructive or improper his conduct of the proceedings as solicitor has seemed to be, whatever injury has been inflicted on the other party or parties to the

litigation, he has only to show that he left the whole matter in the hands of a clerk and he will then escape the jurisdiction of the court in relation to costs. It would also seem to follow that, if, instead of a single solicitor, a firm with two or more members is acting for the client, it will be necessary in such a case to inquire into their several responsibilities, and an order can only be made against those partners who can A
be shown to be personally involved. I am unable to agree with the main proposition, for which, I may add, there seems to be no authority. The jurisdiction to strike off the rolls or to suspend a solicitor seems to me to be of a very different character. Apart from the statutory grounds, it is, of course, true that a solicitor may be struck off the rolls B
or suspended on the ground of "professional misconduct," words which have been properly defined as conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency: *Re A Solicitor*, *Ex p. Law Society* (1). Mere negligence, even of a serious character, will not suffice. The application is strictly C
personal, and relates to the solicitor himself and his fitness to practise. In my opinion, the jurisdiction as to costs is quite different. Misconduct or default or negligence in the course of the proceedings is in some cases sufficient to justify an order. The primary object of the court is, not to punish the solicitor, but to protect the client who has suffered and to D
indemnify the party who has been injured. R.S.C., Ord. 65, r. 11, provides the necessary machinery where the person injured is the client of the solicitor. It is a rule supplementary to the summary jurisdiction of the court. It is not limited to misconduct or default, but expressly extends to costs incurred improperly or without reasonable cause, or E
costs which have proved fruitless by reason of undue delay in proceeding under a judgment or order. The jurisdiction to order the solicitor to pay costs to the opposite party is exercised on similar grounds. The principle will be found clearly stated in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 31, p. 271, where numerous authorities are cited. F
It will be found that many of these authorities depend, in cases where the order as to costs has been made, on the negligence or mistake of the solicitor, and in that sense only on his misconduct in the proceedings. Some of the cases are those where the solicitor has instituted an action without proper authority, and it may be that they can be supported G
on the ground that, in such cases, the solicitor has warranted that he has the authority of his client to act for him in the litigation, though it may be observed that that is not the ground stated by the court, and I think they rest on the jurisdiction of the court over its officers. I propose to select a few cases only for comment. H

In *Re Jones* (2), LORD HATHERLEY, L.C., laid down the rule with his usual clearness. It was a case where the solicitor had engaged to indemnify the plaintiff against the costs of a doubtful suit which failed. The defendants, failing to recover their costs from the plaintiff, applied by petition for (amongst other things) an order on the solicitor to pay their costs. LORD HATHERLEY, L.C., began by laying down the general principle. He said, at p. 499:

> . . . I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned . . .

He added that care should be taken to see that the litigation is the *bona fide* litigation of the client who instructs the solicitor, and not one carried on altogether on the solicitor's account, a well-known proposition with which we are not concerned here. The solicitor was ordered to pay the costs. I cannot find that the proposition laid down by LORD HATHERLEY, L.C., has ever been doubted, and the cases cited in HALSBURY'S LAWS OF ENGLAND certainly tend to support it. Nor is the proposition a modern invention. To go no further back than SAYER ON COSTS, 2nd Edn., 1777, it will be found that he has a chapter (No. 47) "Of the liability of an attorney in a cause to pay costs." He cites there six cases, the first being thus described.

> Many mistakes having been made by the plaintiff's attorney in the copy of a *capias*, a rule was made for him to shew cause why he should not pay to both plaintiff and defendant the costs occasioned by those mistakes (*White* v. *Washington* (3)).

We are left to infer that the rule was made absolute, and the same observation applies to a statement of the case in BARNES' NOTES OF CASES, 3rd Edn., p. 411. In *Fowke* v. *Horabin* (4), another case cited in SAYER ON COSTS, a rule was made for the plaintiff's attorney, guilty merely of gross mistakes in a certain record which had to be amended, to pay the costs occasioned by the amendments (see the statement of the case in BARNES' NOTES, 3rd Edn., p. 11). These cases did not depend on disgraceful or dishonourable conduct by the solicitor, but depended on mere negligence of a serious character, the result of which was to occasion useless costs to the other parties.

If, then, as I think, the authorities show that the jurisdiction may be exercised where the solicitor is merely negligent, it would seem to follow that he cannot shelter himself behind a clerk, for whose actions within the scope of his authority he is liable. That a partner in a firm of solicitors cannot escape from such an order on the ground that he took no active part in the proceedings seems to me to be clear. If authority is needed, I think *Norton* v. *Cooper* (5) may be referred to. A firm of solicitors having instituted a suit without a satisfactory retainer, and the suit having failed, SIR JOHN STUART, V.-C., ordered the firm to pay the costs incurred by the plaintiff in the suit. One partner alone was concerned in the suit, and the other partner contended that he was in no degree liable. SIR JOHN STUART, V.-C., observed, at p. 385:

> The safety of the public, and the rules of court, are to be satisfied only by holding, in a case of this kind, that, as long as Mr. Hawksford [the innocent partner] continued to appear as one of the solicitors of the plaintiff on the records of the court, he is responsible for what took place in the conduct of the cause.

If this is true of an innocent partner, it must be equally true if a person, being solicitor on the record in an action or other legal proceedings, chooses to leave the actual conduct of the matter to a managing clerk. The other parties have no means of knowing what particular part the solicitor, as distinguished from his clerk or his partner, has taken in the matter. If we rely on the principle laid down by Lord Hatherley, L.C., it is clear that the principle will be to a large extent useless if a solicitor on the record has merely to leave everything to a clerk. My conclusion is that Elman cannot dissociate himself from the acts and defaults of Osborn, and in what follows I shall generally omit any reference to him and shall treat his acts as being those of his principal.

My Lords, if we approach the facts on the footing that Elman, as an officer of the court, owed a duty to the court in the proceedings by Mrs. Myers against Norman Baron Rothfield, Henry Isaac Rothfield, Nathaniel Rothfield, and the two firms, and that he was responsible in the performance or non-performance of that duty for the acts or defaults of his managing clerk, a good many of the difficulties disappear. However, although, in the view I take, it is not necessary to show that Elman has been guilty of conduct which would justify the punishment of striking him off the rolls or of suspending him from practice, I entirely agree with the contention that the jurisdiction in question ought to be exercised only when there has been established a serious dereliction of duty as a solicitor, either by himself or by his clerks. The findings of Singleton, J., after a long and patient inquiry, and after hearing the evidence of Elman and his managing clerk, would seem to settle that question. The matter is undoubtedly one of great importance to Elman, however, and we have had the advantage of an elaborate hearing, in which the whole of the material correspondence and the evidence given on the inquiry before Singleton, J., have been exhaustively considered. I am unable to come to any conclusion different from that of the judge, and I shall endeavour as briefly as possible to state my reasons, bearing in mind that Elman is in no way responsible for the frauds of which his two clients have been guilty.

The particulars given before the inquiry directed by Singleton, J., began included two matters, first, the filing of defences by his two clients which he knew to be false, and, secondly, that he prepared and advised and permitted his clients to make and file affidavits of documents which were wholly inadequate and false. On the first charge, the judge absolved Elman. On the second, he found that the charge was true. I think it useful to observe here that there is this plain distinction between defences which consist—as they did here—of a denial of allegations and untrue affidavits of documents. The defences are not on oath, and they merely put the plaintiff to the proof of the allegations in the statement of claim. Moreover, as the judge pointed out, there is, in such a case as the present, a matter of damages which must be determined if the plaintiff's allegations are proved. On the other hand, in many actions, and in particular in such an action as Mrs. Myers had brought, based on disgraceful frauds and on fraudulent conspiracy of the most shameless character, it is essential, in the interests of justice, that the defendants should be compelled to make full disclosure of all the documents bearing on the alleged frauds in the form of proper affidavits of documents. If the defendants are guilty of the alleged frauds, it is hardly to be expected that they will make adequate affidavits without considerable pressure. However guilty they may be, an honourable solicitor is perfectly justified in acting for them and doing his very best in their interests, with, however, the important qualification that he is not entitled to assist them in any way in dishonourable conduct in the course of the proceedings. The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise his client as to the latter's bounden duty in that matter, and, if the client should persist in omitting relevant documents from his affidavit, it seems to me plain that the solicitor should decline to act for him any further. He cannot properly, still less can he consistently with his duty to the court, prepare and place upon the file a perjured affidavit.

A further observation should be made here. Suppose that, in such a case, the client swears an affidavit of documents which discloses nothing relating to the frauds alleged in the statement of claim, and suppose that the solicitor has previously given his client full and proper advice in the matter, but has no good reason to suppose that the affidavit is untrue. It may be asked, what else ought the most punctilious solicitor to do ? My answer is : Nothing, at that time. However, suppose that, before the action comes on for trial, facts come to the knowledge of the solicitor which show clearly that the original affidavit by his client as defendant was untrue, and that important documents were omitted from it. What then is the duty of the solicitor ? I cannot doubt that his duty to the plaintiff, and to the court, is to inform his client that he, the solicitor, must inform the plaintiff's solicitor of the omitted documents, and, if this course is not assented to, he must cease to act for the client. He cannot honestly contemplate the plaintiff failing in the action owing to his client's false affidavit. That would, in effect, be to connive at a fraud, and to defeat the ends of justice. A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the court to put the matter right at the earliest date, if he continues to act as solicitor upon the record. The duty of the client is equally plain. I wish to say with emphasis that I reject the notion that it is justifiable in such a case to keep silence, and to wait and wait till the plaintiff succeeds, if he can, in obtaining an order for a further and better affidavit. To do so is, in the language of SINGLETON, J., to obstruct the interests of justice, to occasion unnecessary costs, and, even if disclosure is ultimately obtained, to delay the hearing of the action in a case where an early hearing may be of great importance.

The relationship of the three Rothfields, the dates of the events in this eventful story, and the early history of the fraudulent family, so far as it was known to Elman, are of first-rate importance in considering the circumstances proved as to the various affidavits of documents sworn by Elman's clients. It should be stated that the three Rothfields were the main defendants in the action. Henry Isaac Rothfield was the father of Norman Baron Rothfield and Nathaniel Rothfield. The first of these three was, to the knowledge of Elman, an undischarged bankrupt, having been so adjudicated in 1922 and again in 1928. Nathaniel was an infant when the writ was issued. He attained the age of 21 years on May 17, 1937, and he then adopted the defence filed on his behalf by Elman, acting for the guardian *ad litem*. Another material fact is that Henry Isaac Rothfield was arrested on Nov. 13, 1936, and charged with the Horwood & Co. frauds, including that practised on Mrs. Myers. Elman obtained bail for him, and he was apparently at large till Sept. 7, 1937, when he was convicted at the Old Bailey of all the frauds, including those the subject of Mrs. Myers' action, and sentenced to 4 years' penal servitude. It is not surprising that he did not appear at the trial in Mar., 1938. Nor did Nathaniel Rothfield, who had gone to the West Indies in Jan., 1938, on the ground of ill-health.

Henry Isaac Rothfield and Nathaniel Rothfield were not strangers to Elman when he entered appearances for them in the Myers action on Nov. 6, 1936. In Mar., 1935, he had acted for Morser in the purchase of the business of Horwood & Co. In Dec., 1935, on the instructions of Nathaniel Rothfield (aged 19), he acted in the incorporation of a private company called the Mushroom Farmers Association, Ltd. In Jan., 1936, he acted for that company in an action brought against it for passing off and breach of copyright. Nathaniel Rothfield was the sole director of the company. Elman knew that the father was an undischarged bankrupt, a circumstance which might explain his absence from the board. In Mar., 1936, it is proved that Elman was giving advice to Henry Isaac Rothfield and Morser in relation to the formation of a limited company to take over the business of Horwood & Co. He appears to have opposed such a step, and it is plain that he must have known something of its activities to have been in a position to give that advice. In Apr., 1936, and on subsequent dates up to June, 1937, he acted for Nathaniel Rothfield in the purchase of a number of small properties, which were conveyed to Norman Baron Rothfield as trustee for Nathaniel, who, ostensibly at least, found the purchase moneys. On June 19, 1936, an action claiming damages for frauds of the share-pushing kind was commenced by Lady Chichele Plowden against one Thomas Livingstone, Henry Isaac Rothfield and Nathaniel Rothfield. Elman arranged that Norman Baron Rothfield should be guardian *ad litem* for his brother Nathaniel, and entered appearances for all three defendants. On July 31, 1936, one Still commenced a similar action, which (after amendment) claimed damages against Morser, Henry Isaac Rothfield and one

McArthur. Morser and Henry Isaac Rothfield consulted Elman, who delivered the latter's defence on Jan. 11, 1937. Morser joined Henry Isaac Rothfield and Nathaniel Rothfield as third parties, and claimed to be entitled to be indemnified by them. Elman acted for them on this claim, which was afterwards dismissed on the ground that it was founded on a fraudulent conspiracy. The action succeeded on May 25, 1937. The Myers action began on Nov. 3, 1936.

The degree of acquaintance between Elman and Henry Isaac Rothfield is to be surmised from a letter dated Mar. 15, 1937, four months after the arrest of this client on a grave charge of fraud:

> Dear Henry, *Re* Myers, Still, &c.
>
> I find from certain correspondence which has been supplied to me and which I have not heard of or seen before that your position as between H. Morser and yourself in the third-party proceedings and which proceedings are open and well known to the various plaintiffs, will require very careful explanation.
>
> In order that you will understand my meaning, I enclose herewith copies of three letters and shall be glad to know exactly how you are proposing to deal with it.

It may be noted in passing that Highcroft Farm, where Henry Rothfield was residing, was one of the properties bought by Nathanield Rothfield, and it may be surmised that the latter was on good terms with his father. The important points about the letter are, first, that Elman addressed his client in familiar fashion by his first name, and, secondly, that the three letters seemed to have caused Elman some perturbation of mind. My Lords, I am not surprised. The three letters, which the judge cited in full, seem to me to establish beyond reasonable doubt that Henry Isaac Rothfield was the virtual owner, and in any case the prime mover in the activities, of Horwood & Co., and that Morser, as he was contending in the Still action, was little more than a dummy. It should be added that Morser had been arrested in Sept., 1936, as the presumed owner of the business of Horwood & Co., and that his release was followed by the arrest of Henry Isaac Rothfield—facts which pointed in the same direction.

The close connection of Henry Isaac Rothfield with the business of Horwood & Co. can scarcely have come to Elman as a complete surprise. On Aug. 20, 1936, there had been an interview at Elman's office at the instance of some respectable brokers who had been innocently connected with the fraudulent sale by Horwood & Co. of certain valuable shares belonging to Mrs. Myers. Several persons were present, including Elman in person, a representative of the brokers, and one Barker, a clerk sent by Messrs. Peacock and Goddard, the solicitors for Mrs. Myers. (Her action, it will be remembered, began a fortnight later.) A letter to " Mr. Horwood " by Mrs. Myers relating to her shares was read aloud by Elman. The evidence given by Barker on the inquiry was that those present throughout referred to Rothfield as being Horwood, and the witness added that it was obvious that Elman knew that Rothfield was Horwood. It should also be stated that, when Elman was asked for copies of the letters addressed to, or coming from, the possession of

Horwood & Co., he said he would "get into touch with Mr. Rothfield," and, subject to that, would supply the copies. Counsel for Elman, with, I think, admirable discretion, did not ask any questions in cross-examination on these points. There was, of course, to the knowledge of Elman, no "Mr. Horwood" at this time, and he did not apparently think that any one really controlled Horwood & Co. except Henry Isaac Rothfield. This person in fact had pretended to be Mr. Horwood at a lunch he gave to Mrs. Myers.

Elman's knowledge of Nathaniel Rothfield was perhaps not so intimate. As we have seen, he acted for him in the formation of a company and in the purchase of a number of properties. He knew that this precocious infant had at least one banking account, for on Aug. 10, 1936, he received a cheque for £1,000 from him drawn on Nathaniel's own account at Lloyds Bank, 222, Strand. On Aug. 17, 1936, he delivered the defences of Henry Isaac Rothfield and Nathaniel Rothfield in the Lady Chichele Plowden action, presumably on instructions.

My Lords when the statement of claim in the Myers case was delivered, the knowledge already at the disposal of Elman was more than enough to put him on his guard. The case reeked with fraud. The charges made in the various proceedings against Henry Isaac Rothfield and Nathaniel Rothfield might, no doubt, be untrue, and the criminal proceedings against the father might break down, but the clouds seemed to be gathering, and care was necessary. The first affidavits of documents sworn by Henry Isaac Rothfield and Nathaniel Rothfield in the Myers action, dated Mar. 1, 1937, disclosed nothing of the connection of either with Horwood & Co. I will assume that at that time Elman had nothing but suspicions as to the inadequacy of these affidavits. He was, however, warned by Messrs. Peacock and Goddard, by a letter of Mar. 5, of the many documents which were undisclosed. This letter, and a number of subsequent letters, are set out in full in the judgment of Singleton, J., and I cannot usefully transcribe them here. That Elman was under no illusions after he had obtained, in Mar., 1937, the three letters above referred to seems to be clear from his letter to Nathaniel Rothfield on May 5, 1937, in which he told his client that there should be in his possession pass-books showing payments made by him in connection with his purchase of shares in Consolidated Gold Alluvials of British Columbia, Ltd. (a purchase which formed part of the fraud on Mrs. Myers), and his transactions in connection therewith with Horwood & Co. Elman did nothing to compel the production of these documents, and it was left to Messrs. Peacock and Goddard to obtain an order for further discovery. On May 3, 1937, a second affidavit of documents by Henry Isaac Rothfield was filed by Elman. A second affidavit by Nathaniel Rothfield was resisted, but an order was finally obtained.

Nathaniel Rothfield's second affidavit was sworn on May 29, 1937. It disclosed a mass of documents, including correspondence between

Nathaniel Rothfield and Horwood & Co. relating to his transactions with that business in connection with Consolidated Gold Alluvials shares, and it also included a limited number of entries in Nathaniel Rothfield's bank pass-book of his account at Lloyds Bank (Law Courts Branch). During inspection of the documents so disclosed on June 8 and June 23, 1937, the plaintiff's solicitors, while protesting against the inadequacy of the disclosures, pointed out to Elman's clerk that, even in the documents which were disclosed, there appeared references to other banking accounts which Nathaniel Rothfield had not disclosed. Osborn informed SINGLETON, J., at the inquiry that the Lloyds Bank pass-book had not been examined by him, and had been sealed up by Elman's clerks, in accordance with Nathaniel Rothfield's instructions. When that pass-book was first produced to the plaintiff's solicitors, only certain debit items and four credit items were disclosed. The period covered by such items was Jan. 6 to Aug. 18, 1936. This pass-book was not completely disclosed to the plaintiff's solicitors till Nov., 1937, though Osborn stated that in fact it had been in Elman's office for over a fortnight in June, 1937. When it was examined by the judge, it appeared that upwards of £54,000 had passed through this account in a period of approximately 15 months—Aug., 1935, to Nov., 1936—and it also appeared that in that pass-book, on the same page as that on which an entry had been disclosed, there appeared, amongst the entries which had been concealed, an entry showing a payment in cash of £1,000 to Elman on Aug. 10, 1936, and another showing a payment on the same day, simply "cash £1,000."

My Lords, like SINGLETON, J., I do not believe that Elman never looked at the pass-book. It was his duty to look at it, for I cannot think that, in the very peculiar circumstances of this case, it was right for Elman to leave it to his client to say what items in the account ought to be disclosed. Nor was it right to go on resisting discovery, and, in effect, as SINGLETON, J., observed, to leave it to Nathaniel Rothfield to say what was relevant, and to be willing to act upon that, in so far as Elman's dealings with the plaintiff's solicitors were concerned. These were breaches of his duty to the court, in the circumstances of this case. It was not till Nov. 30, 1937, after considerable expense and delay, that Nathaniel Rothfield, as the result of an order, was compelled to swear his third affidavit of documents. The case against him was then clear beyond doubt, for the Lloyds Bank account in full, and other banking accounts which he produced, made it clear that he had taken an important part in the Horwood & Co. frauds. The details are contained in the judgment of SINGLETON, J., and I cannot set them out here. It had thus taken from Jan. 28, 1937, to Nov. 30, 1937—and three orders of the court—to obtain a satisfactory affidavit of documents from Nathaniel Rothfield. I will not deal with the application made in the name of Nathaniel Rothfield to postpone the hearing of the case in order that he might appear as a witness, except to say that I do not believe that he ever intended to enter the witness-box. As the result of the application, the action did not come on for trial till Mar. 7, 1938. Neither solicitor nor counsel appeared for Henry Isaac Rothfield and Nathaniel Rothfield. It is not without significance that Elman never at any time sought to inspect any of the numerous documents disclosed by the plaintiff. A

I think I have said enough to show why I agree with the findings of the judge, and why I think that his inferences, where the matters depended on inference, were fully justified. He had heard and seen the witnesses, and, in view of the knowledge which Elman admittedly possessed of the activities of the Rothfield family, and of his statements B
and those of his clerk in the witness-box, which I have read with care, and of the correspondence which was disclosed, it is my opinion that SINGLETON, J., was amply justified in concluding that Elman was guilty of professional misconduct in not insisting on his clients disclosing the relevant documents as soon as he knew that they were, or had been, C
in their possession, custody or power, and in preparing and putting on the file affidavits of documents which he knew to be very inadequate. It is clear that MACKINNON, L.J., was of the same opinion on the facts, and it seems probable that GREER and SLESSER, L.JJ., also agreed with their colleague as to the facts, and only disagreed on the question of D
law. My Lords, I think this appeal should be allowed, with costs here and below, and the order of SINGLETON, J., should be restored.

LORD ATKIN [read by LORD WRIGHT]: My Lords, this is an appeal from the Court of Appeal, who by a majority allowed an appeal from an E
order of SINGLETON, J., who, after an inquiry lasting five days, had ordered the respondent, a solicitor who had acted for two of the defendants in an action of *Myers* v. *Rothfield*, to pay part of the costs of the action of the successful plaintiff. The ground was that the solicitor had been guilty of misconduct. The misconduct found by the judge was that, in allowing F
certain affidavits of discovery to be sworn and put on the file, he was allowing something to be done which he knew to be wrong, and that, in resisting further discovery, he was obstructing the interests of justice and causing delay. The facts disclosed in the inquiry showed that, during the course of the action, the solicitor, Elman, was for some weeks at a G
time absent from his office, and that he had entrusted the conduct of the litigation generally to the charge of his managing clerk, Osborn, unadmitted but having a large experience of the conduct of litigation. The judge expressed himself as unable to draw any distinction between Elman and his managing clerk, for whom he was responsible. I think H
it fair to assume, as was done in the Court of Appeal, that such words indicate that the judge was not finding that Elman himself was personally a party to the misconduct found. The majority of the Court of Appeal (GREER and SLESSER, L.JJ.) were of opinion that the judge could not exercise his punitive jurisdiction over a solicitor unless the solicitor

personally had been guilty of misconduct, and discharged the order. MACKINNON, L.J., dissented. My Lords, I believe that all your Lordships are of opinion that the view taken by the majority of the Court of Appeal was incorrect.

From time immemorial, judges have exercised over solicitors, using
A the phrase in its now extended form, a disciplinary jurisdiction in cases of misconduct. At times the misconduct is associated with the conduct of litigation proceeding in the court itself. Rules are disobeyed, false statements are made to the court or to the parties by which the course of justice is either perverted or delayed. The duty owed to the court
B to conduct litigation before it with due propriety is owed by the solicitors for the respective parties, whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is
C inevitable, and there is no one in the profession, whether in practice or as a judge, who will not bear ungrudging tribute to the efficiency and integrity with which, in general, managing clerks, whether admitted or unadmitted, perform their duties. The machinery of justice would not work without them. Nevertheless, as far as the interests of the court
D and the other litigants are concerned, it is a matter of no moment whether the work is actually done by the solicitor on the record or by his servant or agent. If the court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible, and will be admonished or visited with such pecuniary
E penalty as the court thinks necessary, in the circumstances of the case. Misconduct, of course, may be such as to indicate personal turpitude on the part of the person committing it, and to lead to the conclusion that the party committing it, if an officer of the court, is no longer fit to act as such. Over conduct such as that, punitive jurisdiction will be
F exercised, but it seems hardly necessary to state that no punishment based on personal misconduct will be inflicted unless the party visited is himself proved to be personally implicated. Some confusion has, I think, arisen from the fact that charges of personal misconduct have been generally brought by a special procedure, by a rule or order to answer
G allegations made in an affidavit, later by a report by the Discipline Committee of the Law Society, and now, since 1917, by proceedings before the society, who themselves determine the facts and the punishment. Such cases involve personal misdoing. They are rightly termed cases of professional misconduct, but the words "professional misconduct"
H themselves are not necessarily confined to cases where the solicitor himself is personally guilty. After all, they only mean misconduct in the exercise of the profession, and they cover cases where a duty is owed by the solicitor to the court and is not performed owing to the wrongdoing of the clerk to whom that duty has been entrusted. In *Dunkley* v. *Farris* (6), the solicitor's clerk had forged the seal of the court to the

writ. In *Re Eyre, Palmer* v. *Evans* (7), the solicitor's clerk had falsely represented to the defendant that judgment had been signed and execution issued, whereby he had paid an unnecessary sum for costs. In neither case was the solicitor personally implicated, but in both he was ordered to pay the costs, and, in the latter case, to refund the excessive costs. In both cases, it may be observed, the application was to the full court that the solicitor should answer matters contained in an affidavit, upon which the court could proceed to attachment or to suspension or removal from the rolls. It seems to me quite incorrect to suppose that the cases in which solicitors have been ordered to pay costs where there has been no personal complicity are cases in which the court is exercising a kind of summary jurisdiction in contract or tort by way of awarding damages for breach of warranty of authority. The court is not concerning itself with a breach of duty to the other litigant, but with a breach of duty to itself. Its jurisdiction is punitive, and is exercised in appropriate cases and in appropriate measure where there has been no personal complicity by the solicitor charged.

The only question that remains is whether the judge was right in his finding that the managing clerk, Osborn, had been guilty of misconduct which justified the order against his principal to pay part of the costs of the action. It is to be noticed that the judge laid down for himself a standard which was perhaps too favourable to the solicitor :

> By misconduct is meant something which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute—for example, wilfully misleading the court in the conduct of a case.

I think that this is too favourable, for it would appear from the cases that a breach of duty owed to the court committed by gross negligence may lead to the exercise of punitive jurisdiction. In the present case, however, it is right to accept the test laid down by the judge and ascertain whether, by that standard, misconduct was proved. I have had the opportunity of considering the survey of the facts made by Viscount Maugham and Lord Wright and, as I agree with their statement and with the conclusions they draw, I find it unnecessary to discuss the evidence at any length. The question is confined to the matter of discovery of documents. It is a subject which undoubtedly often presents difficulties to a solicitor, who in quite ordinary disputes finds it difficult to convince his client that business documents, as well as documents which the client considers private and confidential, must be disclosed. The difficulty is increased where the case involves a charge of dishonesty against the client, who may have every motive for concealing some, at any rate, of the relevant documents. What is the duty of the solicitor ? He is at any early stage of the proceedings engaged in putting before the court, on the oath of his client, information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance, and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents, or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter, but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge, and, if he reasonably decides to believe his client, criticism cannot be directed to him. I may add, however, that the duty is specially incumbent on the solicitor where there is a charge of fraud, for a wilful omission to perform his duty in such a case may well amount to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution.

I am myself satisfied that the judge had ample evidence on which to find that Osborn, in allowing the two earlier affidavits to be sworn and put on the file, was allowing something to be done which he knew to be wrong. In the discussion before us, little was said about Nathaniel Rothfield's first affidavit, which was filed on Mar. 1, 1937, the same day as Henry Rothfield's, and about 14 weeks after the latter had been arrested on charges of fraud. In Aug., 1936, Elman had had handed to him by Henry the documents passing between Mrs. Myers, the plaintiff in the case, and Horwood & Co., for whom Henry was at any rate ostensibly manager. We know now that the worthless Canadian gold shares supplied to Mrs. Myers had been purchased through Nathaniel, and that most of the proceeds of the valuable shares of which she had been defrauded had been paid into Nathaniel's account. It seems almost certain that such reasonable inquiries addressed to Henry as through whom were the gold shares bought, how were they paid for, how were the valuable shares sold, where did the proceeds go, would either have elicited the truth or have satisfied the solicitor that concealment was being practised and that the solicitor could not honestly continue. In regard to the second affidavit of Nathaniel, filed on May 29, however, the facts, as found by the judge in the documents disclosed in relation to it, appear to me conclusive of the misconduct of Osborn. The issue turns upon the disclosure by Nathaniel of his pass-book at Lloyds Bank in the Strand. It is described in Sched. I, Part I, as "Pass-book, Lloyds Bank, Ltd., 222, Strand, W.C., relevant entries only." At the time when the affidavit was sworn and filed, the pass-book had not been produced to the solicitor, no entries had been identified as the relevant entries, and no part had been sealed up. The book itself was, or rather the sheets were, not taken by Nathaniel to Osborn, according to the latter's account, until the morning of June 8, the day upon which the plaintiff's solicitors were attending for inspection, and on that day Osborn, who had the sheets in his possession, directed his typist to seal up all the portions of the sheets except those which had been marked as relevant by Nathaniel himself. This procedure in itself seems to me highly irregular. By such a proceeding, no oath is taken by the party defining what is relevant, or therefore defining that which he may have in his possession but swears to be irrelevant, and, as far as the solicitor himself is concerned, it would be a grave breach of duty to leave the decision as to relevance to the oath of a boy just come of age, who, with his family, was charged with fraud, and who obviously had been guilty of a misstatement in his first affidavit. The charge is established, however, by two facts, (i) the judge's finding that he does not accept Osborn's statement that he did not see the whole contents of the pass-book, (ii) Osborn's admission, which was obviously correct, that any experienced person who saw the whole pass-book and the large amount of receipts—namely, £54,000 in about 12 months—would recognise that the whole pass-book was relevant. On the judge's finding, with which I entirely agree, Osborn must have seen the whole book. If so, he allowed the affidavit to take the form of having sworn to only a few relevant entries, and not to the whole.

It may be mentioned that, apart from this, an inspection of an alleged account between Horwood & Co. and Nathaniel, which was in fact disclosed, reveals payments and receipts in addition to those actually disclosed, some of which undoubtedly appeared in the pass-book, and were thus in that document concealed. I need only refer to one item—namely, the sale of £2,500 3½ per cent. War Loan—which is entered in the pass-book under Aug. 14, 1937, the receipt of which from Horwood & Co. is entered in the Horwood account a day or two previously. There are others equally relevant. I do not go into detail as to the correspondence, but I am also satisfied that the letters passing between the solicitors and the proceedings on the various summonses for further discovery well warrant the judge's finding that, in resisting further discovery, the solicitor was obstructing the interests of justice, adding to the difficulties of the plaintiff, and causing delay where a speedy judgment was of great importance to the plaintiff. In coming to the conclusion that the appeal should be dismissed, I have tried to bear in mind the difficulties into which an honest member of the profession is put when he has to defend a client charged with dishonesty or any other crime. He is not to arrogate to himself the ultimate decision, which is to be the judge's. He may be suspicious, but his suspicions may be misplaced. Every one has a right to have his defence put before the court. In such cases, however, it is specially incumbent upon solicitor and counsel alike to observe their obligations to the court. As Dr. Johnson said, they are not to tell what they know to be a lie. It is because the rule of conduct was in this case gravely broken that I think that the salutary decision of Singleton, J., should be restored.

Lord Russell of Killowen: My Lords, assuming that the judge has rightly found that Osborn knowingly filed false affidavits of documents, the court was, in my opinion, entitled, in the exercise of its jurisdiction over its officers, to order Elman, who was the solicitor on the record for the deponent, and who acted by Osborn, as such solicitor, to pay such amount of the plaintiff's costs as the court deemed proper. It is, I think, immaterial that no professional misconduct is attributable to Elman personally. He would none the less have failed in the discharge of the duty which he owed to the court. I agree in all respects upon this point with the opinion of VISCOUNT MAUGHAM, which I have had the privilege of reading. Nevertheless, I would dismiss this appeal, because, although I differ from the reasons upon which the order of the Court of Appeal is founded, I am of opinion that, upon the evidence before us, A it is impossible to hold that any of the charges alleged against Osborn have been proved. If this view is correct, an order against Elman could not stand, for *a fortiori* no charge has been proved as against him.

Let me first state what were the charges which Elman was called B upon to meet, and in regard to which his case, and the evidence in support of it, were presented at the hearing before SINGLETON, J. It is essential to appreciate what the exact charges were, because the proceedings which were based upon them are in their nature penal, and the respondent was in the position of a person accused. In these circumstances, C the accuser must be confined to the actual charges made, and it is not open to the tribunal to find that other charges are proved, and to impose a punishment accordingly. Nor was any notice ever given that other and additional charges would be made or considered. The actual charges which Elman was called upon to meet are clearly defined D by the particulars. They were two in number, which I quote *verbatim* :

> (1) Mr. Burnett L. Elman instructed counsel to draw and then filed defences which were to his knowledge false in respect of each and both of his clients, persisting in such conduct of the defence of these defendants notwithstanding that his client Henry Isaac Rothfield had been convicted and sentenced to penal servitude for the frauds, the subject of the plaintiff's claim. (2) In the light of the knowledge which the respective solicitors had of the business conducted by their clients and E of the position and relationship of their clients and of the existence of material documents which were or had been in the power, possession or control of their several and respective clients, each of the solicitors were (*sic*) guilty of misconduct in preparing and advising or permitting their clients to make and file affidavits of documents which were wholly inadequate and obviously false.

The first charge I will allude to no more. The judge found no mis- F conduct under that head. The second charge may, I think, be summarised as a charge of knowingly filing false affidavits of documents. That is the accusation, that and nothing else. Even as to this charge, however, it has, upon the judge's findings, been confined before your Lordships' House to a charge in relation to the affidavits of documents sworn by G Nathaniel Rothfield. The judge makes no specific finding in relation to Henry Rothfield's affidavits, nor was any case in respect of them opened before us. They are not even included in the books before us, and I have never seen them.

To understand with accuracy what the judge decided, it is necessary H to read his judgment with some care, because the findings of fact are not formally or consecutively stated. They have to be picked out here and there. I will now state these findings and make my comments upon them. 1. The first finding is in relation to Osborn's knowledge of the contents of the pass-book relating to Nathaniel's account with Lloyds Bank. Osborn's evidence was to the effect that it came into his possession for the first time on June 8, 1937, that Nathaniel brought it to the office and told Osborn that he had marked the only relevant entries, that he, Osborn, did not examine it because he had to leave the office to keep another appointment, and had therefore no time to examine it, but that, since the plaintiff's solicitors were due to come and inspect documents at noon, he handed the pass-book to a clerk with instructions to cover or seal up the unmarked entries. That was the only evidence upon this point, except that of the clerk who covered up the unmarked entries, and who corroborated the instructions given to her. The judge's finding was as follows:

> I cannot accept the explanation given to me by Osborn. . . . I feel sure that he examined the pass-book when it was handed to him. Even a cursory examination of it must have satisfied him how damaging it was to Nathaniel Rothfield's case, and, acting on the client's instructions, he determined to keep it back as long as he could, adopting the attitude shown by the letter of June 26, 1937, which I have already read.

My Lords, I have read and re-read the evidence in this case, and I can find nothing to support such a finding. I am in the dark as to the reason for the judge's disbelieving Osborn's explanation. The shorthand notes afford no clue. However, if the only witness to a material fact swears "Yes," and the judge elects to disbelieve him, "No" is not thereby proved. There is still no evidence that Osborn did on that occasion examine the pass-book, which, I may observe, consisted of 36 pages. Still less is there any evidence of any instructions to Osborn to keep back the pass-book, or of any determination by Osborn to keep it back. As to the letter of June 26, 1937, I can see nothing wrong in its contents. Indeed, the plaintiff's solicitors never replied to it, and made no further move in relation to discovery until some four months had elapsed. I am of opinion that this finding is without any justification. In addition to this, however, the finding is irrelevant to the charge, for, even if it were true, any knowledge acquired by Osborn in June, 1937, and any determination then formed to keep back the pass-book, could only establish the known falsity of an affidavit by Nathaniel subsequently filed, namely, Nathaniel's third affidavit, which was sworn and filed on Nov. 30, 1937. Of this affidavit, however, no complaint is made. By it, the whole pass-book was disclosed. 2. Later in his judgment, the judge, referring to this disclosure, says:

> The failure to disclose the accounts, Lloyds Bank accounts in particular, at the proper time, added to the plaintiff's difficulties, added to the expense, and entailed delay. I am satisfied that it was a deliberate policy adopted in the office of Elman.

That is indeed a grave charge, but, for myself, I see no trace in the documents or evidence of any such policy, deliberate or otherwise, and no such charge is included in the indictment. 3. The judge also finds that the order for the third affidavit of Nathaniel was made notwithstanding the opposition of Osborn, and that, in resisting discovery of the Lloyd's banking account, the solicitor was obstructing justice. He adds:

> He—when I say "he," I mean either the solicitor or his managing clerk, or both—knew the relevance of the banking account and the importance of it. He held it up as long as he could merely on the request of his client Nathaniel.

That Osborn knew the relevance of the Lloyds banking account when the order for the third affidavit was made is not in dispute, but there is no justification for the statement that the order was opposed. There is no evidence to that effect at all. It is the other way. Nor can I discover any foundation for the suggestion that the banking account was held up on the request of Nathaniel. I need not repeat the criticism of the irrelevance of such a finding in relation to the charge as regards the third affidavit. 4. The only finding of the judge which is strictly relevant to the charge made runs thus:

> In allowing the two earlier affidavits to be put upon the file, I believe the solicitor was allowing something to be done which he knew to be wrong.

This I understand to be a finding that Osborn knew that Nathaniel's first two affidavits were false, but it is a finding which appears to me to have no foundation on the evidence. I have read the correspondence between Osborn and Nathaniel and the evidence of Osborn, and I find nothing therein to justify a charge of this nature. The letters written by Osborn in the name of the firm appear to me proper in all respects. My Lords, I have an uneasy feeling that the judge may, in arriving at his findings of fact, have unconsciously transferred to a solicitor and his clerk the prejudice which properly attached to the rogues for whom they were acting, with the result that he has found Osborn guilty of conduct which was neither alleged nor proved. In my opinion, the only charge with which this House was concerned was unsupported by any evidence and this appeal should be dismissed accordingly.

LORD WRIGHT: My Lords, the Court of Appeal, by a majority consisting of GREER and SLESSER, L.JJ. (MACKINNON, L.J., dissenting), reversed the decision of SINGLETON, J., who, by way of exercising the summary jurisdiction which the court has over solicitors as officers of the court, had directed payment to the appellant, the plaintiff in the action, of one-third of her costs of the action and two-thirds of the costs of the application in pursuance of which the order was made. The respondent had acted as solicitor for Nathaniel Rothfield, one of the defendants in the action. The judge made the order because he found that the respondent or his clerk had been guilty of professional misconduct in regard to discovery in the action. The Court of Appeal overruled his decision, because they held that misconduct was not established against the respondent personally, but, if at all, only against his clerk, and that the punitive powers of the court could only be exercised when the solicitor was guilty personally of misconduct. It is not clear whether they accepted that the evidence showed the deliberate obstruction to complete discovery on the part at least of the solicitor's clerk which the judge found as a fact. Before this House, the respondent sought to support the judgment of the Court of Appeal, not only on the ground of law on which it was based, but also on the ground that the judge's finding of fact that there was professional misconduct was not justified by the evidence. The House has accordingly heard an A elaborate examination of the evidence before the judge.

The crucial issue in these proceedings concerns the conduct of the solicitor, or his clerk, in regard to discovery, but it will be convenient to give a meagre, but I hope sufficient, outline of the general facts of the case. The appellant, Mrs. Myers, who was plaintiff in the action, B brought her action against a number of defendants, Norman Baron Rothfield, Henry Isaac Rothfield, Nathaniel Rothfield, Rothies (sued as a firm) and Horwood & Co. (sued as a firm). The writ was issued on Nov. 3, 1936, and claimed £9,560 2*s*. as money had and received by the defendants to the use of the plaintiff, or, in the alternative, damages C for conspiracy and fraud. The allegations of the statement of claim were established at the trial, and the defendants, including Nathaniel Rothfield, were found guilty of conspiracy. The story was of a character unfortunately too common. The world is left uncertain whether to wonder more at the greed or at the credulity of the victims. D Mrs. Myers received a circular as from Horwood & Co. inviting her to invest in what was called an Empire Produce Pool, which was to produce without any risk about 12½ per cent. for three months, both capital and profit being guaranteed. She sent £50 as the purchase price of 5 units of £10 each in the Pool. This was on June 10, 1936. E There was, of course, no pool, but a month or so later she was informed that the profits were £6 10*s*. She was persuaded then by Horwoods to buy 56 shares in Consolidated Gold Alluvials, Ltd., at 20*s*. per share, which Horwoods represented would soon be worth £2 or £3 per share. That would use up £56, leaving 10*s*., which was sent to her in settlement. F This was the bait. She was next entertained at lunch at the Savoy Restaurant by Horwood, who turned out later to have been Henry I. Rothfield, and was in the end induced to buy 7,500 shares in the Gold Alluvial company at the same price. She had not the money to pay for them, but was persuaded to deposit a number of valuable shares G which she possessed, together with transfers in blank, to be used, so H. I. Rothfield said, to obtain a loan of the necessary cash to purchase the gold company's shares. The profits were to be realised in less than a month. The shares would then, it was said, be released from the charge, and she would get the balance of the profits. Nothing H could be simpler or more attractive. Unfortunately, there were no profits, the gold shares were worthless, and the blank transfers given by the appellant were used by Rothfield in order to sell her shares and convert the sums so realised. The appellant seems soon to have become suspicious, or at least to have disclosed to her husband or friends what she had done. Her solicitors at once wrote to the Birmingham brokers who had put through the sale of the shares, explaining what had happened. The brokers applied to Horwood & Co. At their offices, they saw H. I. Rothfield, who at once consulted the respondent by telephone. The respondent was thus put in touch with the brokers' solicitors, and had the file of papers sent to him for examination. On Aug. 20, 1936, he had a full discussion with the brokers' solicitors. On Nov. 3, 1936, the writ was issued, the statement of claim being delivered with it. On Mar. 11, 1938, after trial before SINGLETON, J., and a special jury, judgment was entered for the plaintiff against all the defendants for £9,400 16*s.* 1*d.* and costs. The trial was delayed largely owing to the obstructive policy in regard to discovery pursued by Nathaniel Rothfield. Nothing has been realised on the judgment.

Henry Isaac Rothfield, father of Norman Baron Rothfield and Nathaniel Rothfield, was at all material times an undischarged bankrupt. Nathaniel Rothfield was, at the date of the writ, an infant, but came of age on May 17, 1937, when he adopted the defence filed on his behalf by the respondent, who was acting, at that stage of the action, for both Nathaniel and his father. The respondent also acted for H. I. and Nathaniel Rothfield in an action brought in May, 1936, by Lady Chichele Plowden, in which similar frauds were alleged, but it was never brought to trial. In yet another action of the same type, *Still* v. *Morser*, he entered appearance, and delivered a defence on behalf of H. I. Rothfield, who was one of the defendants, though at a later date another solicitor, Garber, took over his defence in that action. On Nov. 13, 1936, H. I. Rothfield was arrested on charges of fraud in connection with the sale of Consolidated Gold Alluvial shares, including the transactions with the appellant. The respondent at first acted for him in these proceedings, but was replaced by another solicitor before the date of the trial, which was in Sept., 1937, when Rothfield was convicted and sentenced to 4 years' penal servitude. I think it is clearly established that the respondent was at all material times aware that Horwood & Co., though one Morser was, up to a certain date, registered as proprietor under the Business Names Act, was in fact the business of H. I. Rothfield, and was merely a name or cover which he used for his dealings. I need not here detail my reasons for this conclusion, nor refer to the numerous third-party proceedings brought by Morser against the Rothfields, in which the respondent acted for the latter in the various actions brought against Morser alleging frauds such as those in the *Still* v. *Morser* action or the appellant's action. Morser had in fact obtained a letter of indemnity from Rothfield. The respondent seems to have been on terms of some intimacy with H. I. Rothfield, whom in one letter he addresses as "Dear Henry." It appeared that during the material period large sums of money passed to him from Nathaniel Rothfield.

I think this brief and far from complete outline is sufficient to indicate the complicated web of affairs in which the respondent acted for the Rothfields, including Nathaniel, who has been established as a co-conspirator. It also shows how important discovery was in order to elicit the relationship of the different defendants, so as to establish the conspiracy, and, if possible, trace what had happened to the proceeds of the frauds, a large portion at least of which, it is now established, A passed through Nathaniel Rothfield's bank account. The disclosure of bank books and of accounts was in this respect particularly vital. In fact, as will appear, there was no proper disclosure until after two orders for further discovery had been made, and until after the third affidavit was sworn, which was not till Nov. 30, 1937, the order for B directions providing for an affidavit of documents within 10 days having been made as far back as Jan., 1937. The documents disclosed under Nathaniel Rothfield's third affidavit, in particular his pass-books, showed clearly enough that he had been receiving large sums of money, about £54,000 in all over a period of about 12 months, including many payments C from Horwood & Co. It also disclosed documents showing purchases of the Gold Alluvial shares, as well as other dealings with that firm. There could be no possible doubt of Nathaniel Rothfield's complicity in the fraud as soon as this discovery was made. However, when at last the case came on for trial and judgment was obtained, D the cupboard was bare. Nathaniel Rothfield did not appear at the trial.

After judgment was given, an application was made to Singleton, J., to exercise the summary jurisdiction of the court over the respondent as a solicitor and officer of the court in respect of his professional conduct E in the case. A similar application was made in respect of the solicitors for the other defendants, but, as this failed, I do not discuss it further. The application was based on two separate grounds. The first was that the respondent had filed and persisted in a defence which he knew, or had reason to think, was false. Singleton, J., rejected the application, F so far as based on this ground, and I agree with what he has said. There may, indeed, be circumstances in which a legal adviser has taken such action, or so comported himself on behalf of a client, as to go further than an honest advocate or solicitor could properly go. It is difficult, and perhaps impossible, to formulate any principle G which would afford a general definition applicable to such cases. Singleton, J., wisely said:

> Nothing ought to be said which may prevent, or tend to prevent, solicitor or counsel from doing his best for his client, so long as his duty to the court is borne in mind.

H

A client is entitled to have legal aid in order to put the other side to proof of the case against him, and to test and probe that case and the evidence adduced. Thus, the client is entitled to say that he denies the fraud or other matters charged, and to have that defence placed on the record. He is entitled to have professional aid in regard to the maintenance of that defence before and at the trial, and to plead matters in mitigation of, and in regard to, questions of damage. Whatever knowledge or suspicion the respondent may have had of the Rothfields, he did not pass the limits fixed by his duty as an officer of the court merely in filing, or persisting in, the defences. I agree with the opinion of SINGLETON, J., that it is not sufficient evidence of misconduct, taken by itself, that a solicitor continued to act in the action notwithstanding that he was aware, or was put on inquiry, that the defendants were, or might be, raising false issues in it. The judge's decision on this matter was not questioned in this House. The second complaint raised in the appellant's application had reference to discovery. The general effect of the complaint, as stated in the application, and so far as here material, was that the respondent was guilty of misconduct, in the light of what he knew or might reasonably suspect of his client's business and of his relationship to the other defendants and of the existence of material documents, in preparing and advising or permitting Nathaniel Rothfield to make and file affidavits of documents which were wholly inadequate, and, as he knew, or was put on inquiry, were untrue. On this head of complaint, SINGLETON, J., decided against the respondent. He held that the original failure to disclose the accounts was a deliberate policy adopted in the respondent's office, and that the respondent had held up discovery as long as he could merely on the request of his client, Nathaniel Rothfield :

> His duty was to see that it [the banking account] was disclosed, and, if the client persisted in his refusal, the solicitor ought to have declined to act further for him. A solicitor is an officer of the court, and owes a duty to the court. He is a helper in the administration of justice. He owes a duty to his client, but, if he is asked or required by his client to do something which is inconsistent with his duty to the court, it is for him to point out that he cannot do it, and, if necessary, to cease to act.

In holding that, in regard to discovery, there was misconduct in a professional sense, he drew no distinction between the respondent and the managing clerk for whom he was responsible, though he said, having heard the evidence of both, that both knew a good deal about the matters in question. I think the judge meant that he drew no distinction either in fact or in law between them. Indeed, he was not asked to do so. The point on which his decision was reversed by the Court of Appeal was not raised before him. It was not raised until the hearing in that court. Similarly, the point that the judge's decision was not justified by the evidence was not raised until the appeal to this House.

In order to deal with the point of law decided by the Court of Appeal, it is necessary to explain briefly the nature of the jurisdiction of the court which the appellant invoked. A solicitor (or, in former days, a solicitor or an attorney) was long ago held to be an officer of the court on the roll of which he was entered, and, as such, to be subject to the discipline of that court. The court might strike him off the roll or suspend him. For instance, the Court of Chancery might strike a solicitor off the roll of the court, and order a communication of that order to be made to the courts in Westminster Hall. There are many such instances in the books. By the Solicitors Act, 1888, there was established the Disciplinary Committee appointed by the Master of the Rolls from members or past members of the Council of the Law Society. This committee were charged with the duty of investigating complaints A against solicitors and reporting their decision to the court, which could then, if so minded, strike the solicitor off the roll or suspend him. It was not until 1919 that, by the Solicitors Act of that year, the Disciplinary Committee was itself given power to strike off the roll or to suspend or to order payment of costs by the solicitor, subject to an appeal to the B court. The jurisdiction of the Master of the Rolls and any judge of the High Court over solicitors was expressly preserved, however, as it now is by the Solicitors Act, 1932, s. 5 (1). Whether the court would now entertain an application to strike a solicitor off the roll or to suspend him instead of leaving the matter to the Disciplinary Committee may C be doubted, but, alongside the jurisdiction to strike off the roll or to suspend, there existed in the court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both. The ground of such an order was that the solicitor had D been guilty of professional misconduct (as it is generally called), not, however, of so serious a character as to justify striking him off the roll or suspending him. This was a summary jurisdiction exercised by the court which had tried the case in the course of which the misconduct was committed. It was clearly preserved to the court by sect. 5 (1). E It was a summary jurisdiction, in which the intervention of the judge was invoked at the conclusion of the case either by motion in the Chancery Court or by a motion or application for a rule in the courts of common law. Though the proceedings were penal, no stereotyped forms were followed. Hence now the complaint is not treated like a charge in an F indictment, or even as requiring the particularity of a pleading in a civil action. All that is necessary is that the judge should see that the solicitor has full and sufficient notice of the nature of the complaint made against him, and full and sufficient opportunity of answering it. Thus, formal amendments of the complaint are not necessary, so long G as the variations of the charge are sufficiently defined and the solicitor is given sufficient liberty to make his answer. The summary jurisdiction thus involves a discretion both as to procedure and as to substantive relief, though there was, and is, an appeal.

The cases of the exercise of this jurisdiction to be found in the reports H are numerous, and show how the courts were guided by their opinion as to the character of the conduct complained of. The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by LORD ABINGER, C.B., in *Stephens* v. *Hill* (8). The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. Thus, a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term "professional misconduct" has often been used to describe the ground on which the court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the court and to realise his duty to aid in promoting, in his own sphere, the cause of justice. This summary procedure may often be invoked to save the expense of an action. Thus, it may, in proper cases, take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive, but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action.

I do not seek to recapitulate the authorities, but, as it has been held by the Court of Appeal that in this jurisdiction a solicitor is not liable to be penalised for the conduct of his agent, partner or clerk, I must refer to a few of the cases in which the contrary has been held. The justification for the rule embodied in these decisions may be that the jurisdiction is compensatory as well as penal, and that the solicitor may fairly be held answerable to make good losses caused by the act of an agent whom he has left to fulfil his duty, and though a solicitor may leave much to his qualified and experienced assistants, he sometimes may be held answerable on the ground of his failure to exercise proper supervision. In *Norton* v. *Cooper*, *Re Manby & Hawksford* (5), SIR JOHN STUART, V.-C., put the rule on a positive basis. He said, at p. 385:

> The safety of the public, and the rules of court, are to be satisfied only by holding, in a case of this kind, that, as long as Mr. Hawksford continued to appear as one of the solicitors of the plaintiff on the records of the court, he is responsible for what took place in the conduct of the cause.

Hawksford was not personally implicated. The fault was that of a partner who had used the name of the official assignee to bring an action against a mortgagee. Each individual partner was, it was held, *prima facie* liable for the misconduct, and was ordered to indemnify the official assignee against his costs. In *Blundell* v. *Blundell* (9), the defendant's attorney was personally ordered to pay the plaintiff's attorney his costs of opposing bail, where there had been a misrepresentation as to the respectability of the bail by the managing clerk of the defendant's attorney, though the latter was not privy to the misconduct. The Court of Appeal in the present case referred to two authorities in order to distinguish them. One was *Dunkley* v. *Farris* (6), where the solicitor's clerk had forged the court's seal on a writ. The plaintiff's solicitor was ordered personally to repay the excessive costs of the proceedings and the costs of the rule, though no blame was imputed to him. The court held there that he was so far implicated as to make him responsible, as what was done was done in his office. The Court of Appeal distinguished that case, as I understand them, on the ground that it was not a case based on misconduct by the solicitor. With great respect, I cannot agree. I cannot see how the personal order that was made there against the solicitor could be justified except as made under the summary jurisdiction of the court. GREER, L.J., explains the decision as one depending on the lack of authority of the solicitor to act for the party named on the writ, and states that it depends on the doctrine of a breach of warranty of authority. It may be that in such cases an action might now be brought on that comparatively modern doctrine, but in *Dunkley* v. *Farris* (6) the court was exercising clearly, as it seems to me, its summary jurisdiction. Its order was not based on any privity or breach of actual or imputed authority. The ground was that the solicitor had committed a breach of his duty to the court. It has been said that it is the duty of the solicitor to make himself certain on the point of having a retainer before he issues a writ. The case presented merely a special instance of improper conduct. This is true also of *Re Eyre, Palmer* v. *Evans* (7), where the court exercised its summary jurisdiction to order a solicitor to repay extortionate costs exacted by his clerk. There was improper conduct, though the solicitor was not personally implicated. JERVIS, C.J., thus sums up the position, at p. 152 :

> . . . as it was done in his office, and by a person for whose acts he is responsible, and as he received the money, I think he is so far implicated as to make him responsible.

It is, no doubt, true that a solicitor will not be struck off the rolls or suspended unless he is personally implicated, but, with the greatest respect, I can find neither reason nor authority for the view of the Court of Appeal that the discretionary and remedial jurisdiction of the court to order reimbursement of costs or expenses thrown away owing to his improper conduct in a case cannot be exercised unless the solicitor is personally implicated. I agree on this point with the judgment of MACKINNON, L.J., who upheld SINGLETON, J.

I do not refer to any others of the numerous cases which illustrate the scope and variety of the jurisdiction, except to two which specifically refer to false affidavits. One is *Re Gray, Ex p. Incorporated Law Society* (10), which was a case where a solicitor had allowed a client to make an affidavit in which he swore to a false date known to both parties to be false. LORD ROMILLY, in ordering the solicitor to be suspended, said that it was impossible for the court to proceed with safety were it not that the solicitors connected with the court should most carefully investigate, and, as far as possible, correct, such statements of their clients as to dates. Similarly, in *Re Davies* (11), the Court of Appeal suspended a solicitor for two years because, *inter alia*, he had allowed a client to swear an affidavit which both he and the client knew to be false. He had warned her it would be untrue, but she insisted on swearing it. The court said that he should have withdrawn from the case. These authorities, in so far as they relate to affidavits, have special relevance to this case, where Nathaniel Rothfield is held to have sworn affidavits of discovery which were false, and where the solicitor (which is the term which I shall use hereafter to include either the respondent or his managing clerk, Osborn, to whom to a large extent he left the conduct of the discovery) could not have allowed them to be sworn if he had done the duty which he owed to the court. The order of discovery requires the client to give information in writing and on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realise the whole scope of that obligation without the aid and advice of his solicitor, who, therefore, has a peculiar duty in these matters, as an officer of the court, carefully to investigate the position, and, as far as possible, see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realise that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit, nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require, or if he insists on swearing an affidavit which the solicitor knows to be imperfect, or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to. That is the improper conduct which the judge has found to have been committed by the solicitor in this case, in his findings of fact which I have summarised above.

In my opinion, these findings were fully justified. The first affidavit sworn by Nathaniel Rothfield was a mere travesty of discovery. It contained in Sched. I, Part I, nothing but letters between solicitors after action brought and the proceedings common to both parties. This elicited a very proper letter from the appellant's solicitors, in which they said, after referring to the character of the action, that it must be clear that a large number of relevant documents had not been disclosed, and suggested that the solicitor should explain to his client the meaning and importance of the affidavit with a view to filing a further and better affidavit. This letter produced no effective result. The solicitor was satisfied with the mere denial of Nathaniel Rothfield. An application for a further and better affidavit was successfully opposed before the master. The judge in chambers, however, reversed the decision of the master, and on Apr. 23, 1937, ordered a further affidavit to be sworn by Nathaniel Rothfield. It was not until May 29, 1937, that, under that order, the second affidavit was sworn, after repeated and urgent complaints of delay. Inspection was given on June 8, 1937. What happened in this connection is most significant. The affidavit included in the schedule Nathaniel Rothfield's pass-book at Lloyds Bank, 222, Strand, "relevant entries only." In the circumstances of the case, the irregular description "relevant entries only" should have roused the interest of the solicitor, unless he had actually prepared it. The entries disclosed in this way were about 30 in number. Some were marked with an asterisk, others had lines drawn in the margin against them. The rest of the account was sealed up. It is now clear that the entries disclosed had been selected with some skill, as dealing with receipts to, or payments by, the client, already disclosed in the discovery given by other defendants. The entries disclosed, however, would have been seen to be most inadequate if the slighest examination of the pass-book had been made. No one disputes now the truth of this. The solicitor admits that he must have seen the incompleteness of the discovery if he had looked at the pass-book. This part of the case rests on the evidence of Osborn, the clerk, as the respondent was away from the office about that time, owing to illness. Osborn seeks to excuse this manifest breach of duty on the grounds that the pass-book was not brought into the office until just before the time fixed for the appellant's solicitor to come to inspect, that he had no opportunity to examine the book, and that he simply sent it to a typist to seal all the entries except those which were marked as being relevant. He said in evidence that he did not even look at the pass-book afterwards, when it was left some days in his office, and he could have done so. Singleton, J., after hearing Osborn's evidence, and after asking him a number of questions, said that he felt sure that Osborn did examine the pass-book when it was handed to him:

> Even a cursory examination of it must have satisfied him how damaging it was to Nathaniel Rothfield's case, and, acting on his client's instructions, he determined to keep it back as long as he could.

This finding of the judge has been strenuously attacked on the ground that it is not based on evidence, and that it is mere speculation, and not inference. It has been argued that the judge was not entitled to go behind the positive oath of Osborn that he did not examine the pass-book, because there is no direct evidence to the contrary. I am unable to accept this argument. The judge's view is not based on speculation, but is a matter of inference, based on all the facts of the case and on the circumstantial evidence, which, according to ordinary experience and probability, make it incredible that Osborn, placed as he was, did not look at the pass-book. Where there is a denial on oath of the charge by a party charged, and no direct evidence to the contrary, a judge or jury may in certain events be entitled to refuse to believe that denial, and to act upon the circumstantial evidence in the case. The same is true in a case like this. I think the judge was entitled to find as he did on all the evidence. In my judgment, however, even if the judge were wrong in discrediting Osborn's evidence that he did not examine the pass-book because he accepted his client's word that it contained no relevant entries, the order which the judge made would still be justified. It would be a gross breach of duty to the court in a matter of discovery like this for a solicitor to accept his client's bare word as to what was relevant, and not himself examine the documents, at least when regard is had to the general background of the case, and to all that the solicitor must have known of his client's character and surroundings. There is really a dilemma. Either Osborn examined the pass-book or he did not. If he did, he must have known that the affidavit was false. If he did not, he committed a gross breach of duty. He had no right to leave discovery to the decision of the client. In fact, when the appellant solicitors wrote pointing out that it was quite clear that there were material entries in the pass-book other than those disclosed, the solicitor still did no more than pass on the complaint to the client, and the appellant's solicitors were compelled to make a further application to the court, which on Nov. 18, 1937, ordered Nathaniel Rothfield to disclose the items sealed up in the Lloyds pass-book and in the pass-book of another bank account which he had, as well as to make a further and better affidavit. The third affidavit, which has been accepted as satisfactory, was eventually sworn under that order. Eventually, after further delays, the case was heard and judgment entered for the appellant against all the defendants on Mar. 11, 1937. It is clear that the difficulties about discovery had increased the costs and so delayed the trial as to diminish or destroy any chance of recovering the fruits of the judgment. In my opinion, the order of SINGLETON, J., was right, and should be restored.

LORD PORTER : My Lords, I agree that this appeal should be allowed. The facts have already been stated, but a re-statement is, I think, necessary in order to make my views intelligible. The respondent is a solicitor who was retained in an action in the High Court of Justice entitled *Myers* v. *Rothfield.* In that action, he represented Henry Isaac Rothfield and Nathaniel Rothfield. Of these defendants, Henry Isaac Rothfield, who was the father of Norman Baron Rothfield and Nathaniel Rothfield, was an undischarged bankrupt, and Nathaniel, at the time of the issue of the writ, was an infant. The firm of Rothies was in fact Norman Baron Rothfield, and the firm of Horwood & Co., which purported to be stock and share brokers, was completely under the control of Henry Isaac Rothfield, though one Morser was registered as the owner under the Business Names Act, and was retained as a nominal figurehead.

It is plain from the findings of the jury that the three Rothfields were engaged in carrying on a systematic swindle, using the firm of Horwood & Co. for that purpose. The method employed was to invite investors to engage in a produce pool by subscribing for £10 units. They were then informed that the pool had been a success, and that they were entitled to considerable profits, and by this means were afterwards persuaded to sell, or to hand over to Horwood & Co. for sale, such investments as they could be induced to part with, and persuaded to buy worthless shares in a company called Consolidated Gold Alluvials, Ltd., shares which in due course were, or purported to be, transferred to the victims of the swindle. Amongst others who were so defrauded was the appellant Mrs. Myers, who between July 9 and July 15, 1936, handed over cash and shares to the value, as the jury found, of £9,560. In her case, that sum was not even invested or re-invested in the shares of Consolidated Gold Alluvials, Ltd., though the money with which she parted had in the main been obtained by representing that she would be wise to purchase such shares, which would shortly show a large profit.

This was not the first occasion on which the respondent's firm had acted for Henry Isaac and Nathaniel Rothfield. On Dec. 12, 1935, the respondent had been instrumental in incorporating a company known first as Mushroom and Fruit Growers Association, Ltd., and later as Mushroom Farmers Association, Ltd., a private company which was formed by Nathaniel Rothfield and of which he was the sole director. Before the issue of the writ in this action, he had also invested a sum of between £3,000 and £4,000 on behalf of the same defendant, whom he knew to be an infant. So far as Henry Isaac Rothfield is concerned, he knew him to be an undischarged bankrupt, and, as he said, believed him to be the manager of the firm of Horwood & Co., which he had been instructed to transfer from Horwood to Morser on Mar. 8, 1935. These matters were within Elman's personal knowledge, but in litigation, as he alleged, he was represented by his clerk, Osborn, and it is clear that many at any rate of the details of litigation were conducted by this clerk, inasmuch as Elman, during a considerable portion of the period material to the present action, was ill, and unable to attend at his office.

Just before Mrs. Myers had parted with her securities, a writ had been issued by Lady Mary Chichele Plowden against one Thomas Livingstone and against Henry Isaac and Nathaniel Rothfield in which she alleged that she also had been fraudulently induced to hand over valuable securities for shares in Consolidated Gold Alluvials, Ltd. The allegations of fraud were similar to those which were afterwards alleged in the Myers case. In the Chichele Plowden case, the writ was issued on June 19, the statement of claim delivered on June 26, and in this case also appearance was entered for the defendants, the two Rothfields, by the respondent, and defences were delivered on Aug. 7, denying the allegations in the statement of claim. Again, on July 31, just after Mrs. Myers had parted with her securities, one William Henry Still issued a writ against Henry Morser, one Macarthur, and one Horwood, alleging similar frauds, and Elman appears originally to have entered appearance for Morser, but later another solicitor represented him. Eventually, Henry Isaac Rothfield was substituted as defendant instead of Horwood, and Morser instituted third-party proceedings against both Henry Isaac and Nathaniel Rothfield. In both Henry Isaac Rothfield's defence and in the third-party proceedings, the respondent acted for the defendants. No doubt the details of these matters were attended to by Osborn, though Elman would, as he said, know generally that the action had been brought and that allegations of fraud had been made against his clients.

Whilst these actions were in progress, Mrs. Myers appears to have realised that she had been defrauded, and to have confided in her husband. He thereupon consulted his solicitors, and they in turn communicated with certain Birmingham brokers, who had been employed to sell some of Mrs. Myers' shares, pointing out that the sale was made without Mrs. Myers' authority. The brokers through their solicitors wrote to Messrs. Horwood & Co. asking for an explanation. In answer to this letter, the solicitors were invited to call upon Messrs. Horwood & Co., and their agents did visit that firm. As a result of the interview, they were referred to the respondent, and three files of documents relating to the Myers' transactions were sent to him with instructions to see the brokers and to give them all possible facilities to investigate the matter. From one of these letters, dated July 29, 1936, it was apparent that Mrs. Myers thought Henry Isaac Rothfield was Horwood. Elman did see the brokers' solicitors on Aug. 20, and read over to them the documents which he had received, and at their request these documents were afterwards copied and sent to them.

During September, further steps were taken in the Still action, and Morser was arrested at Nottingham for fraud, but was afterwards discharged on the ground that he was merely the nominal head of Horwood & Co., whose business was really managed by Henry Isaac and Nathaniel Rothfield. It is fair to say that the respondent did not act for Morser in these proceedings, and it was not proved that the details were known to him. On Nov. 3 the writ was issued in the Myers action, and on Nov. 6 Elman's firm entered appearance for Henry Isaac and Nathaniel Rothfield. On Nov. 13, Henry Isaac Rothfield was arrested for fraud, and, on his first appearance before the magistrate, was represented by Elman's firm and bail obtained for him. Thereafter, however, Elman ceased to act in the criminal proceedings. In fact, Henry Isaac Rothfield was ultimately convicted and sentenced to 4 years' penal servitude for fraud, including the frauds on Lady Chichele Plowden, Mr. Still and Mrs. Myers. The statement of claim in the Myers action had been delivered with the writ, and the defence was delivered on Dec. 12, 1936, but previously Messrs. Peacock and Goddard, in consenting to give further time for its delivery, wrote to Elman stating that the correspondence had already passed through his hands, and ending with the observation :

> You will doubtless disclose the file of correspondence in your client's affidavit of documents with the books relating to the business.

The defences, when delivered, denied any connection with Horwood & Co. on the part of Nathaniel Rothfield and a connection only as manager by Henry Isaac Rothfield, and in these circumstances the first affidavit of documents on behalf of the two defendants was delivered by Elman's firm on Mar. 1, 1937. The affidavit of Nathaniel contained nothing save letters written after action brought. Neither the first nor a later affidavit of Henry Isaac Rothfield appears to have contained any of the letters or documents of Horwood & Co., but, as those affidavits have not been inserted in the appendix, it is not possible to determine what, if any, other documents were omitted. It is apparent that the judge who tried the case had before him both of these affidavits, but, as they have not been inserted in the documents provided for the use of your Lordships' House, I do not propose to found any opinion upon them. After the delivery of these affidavits the appellant's solicitors wrote to the respondent pointing out that neither the circulars issued by Horwood & Co., nor the banking account, books of account, or the correspondence between Horwood & Co. and their clients had been disclosed, and that neither Henry Isaac nor Nathaniel Rothfield had disclosed any documents relating to their connection with Horwood & Co. or any of their own banking accounts, and, further, that Morser had sworn he was merely a nominee of the three Rothfields. Elman's reply was that Henry Isaac had relinquished his managerial position with Horwood & Co., leaving the documents with that firm, and that Nathaniel had instructed him that he had nothing to do with the affairs of Horwood & Co.

On Jan. 8, 1937, Morser, in the Myers proceedings, made the three Rothfields defendants to third-party proceedings. In the statement of claim in these proceedings, he alleged that they were the real principals, and set out three letters, dated respectively Feb. 24, 1936, Feb. 25, 1936, and Mar. 25, 1936, which he said evidenced that an agreement whereby he should merely act as nominee of Henry Isaac and Nathaniel Rothfield had been come to at that time. On Mar. 13, 1937, these letters were sent to Elman's firm, and he himself wrote to Henry Isaac Rothfield on Mar. 15, as follows :

> Dear Henry, *Re* Myers, Still, etc.
>
> I find from certain correspondence which has been supplied to me and which I have not heard of or seen before that your position as between W. Morser and yourself in the third-party proceedings, and which proceedings are open and well-known to the various plaintiffs, will require very careful explanation.

In order that you will understand my meaning I enclose herewith copies of three letters, and shall be glad to know exactly how you are proposing to deal with it.

Please treat the matter as urgent.

Yours truly,
Burnett L. Elman.

He said in evidence that, when he received these letters, he realised A something was wrong. To this letter Henry Isaac Rothfield replied in effect that he had had the first letter written in his son's name, but without authority, that, notwithstanding that letter, he had continued to act as manager for Morser, and that the other two letters were evidence of that fact. Being unable to obtain a further affidavit of documents B without an order of the court, the appellant's solicitors applied on Mar. 18, 1937, to the master, who ordered a further and better affidavit of documents by Henry Isaac Rothfield and Horwood & Co., but dismissed the application as far as concerned Norman Baron Rothfield and Nathaniel Rothfield. On Apr. 23, 1937, however, the judge in chambers C ordered a further and better affidavit by the three last-named parties. On the same day, Elman wrote to Nathaniel Rothfield asking immediately for all documents relating to the matter.

Osborn, having, as he said, difficulty in getting proper discovery from Nathaniel Rothfield, took him to counsel's chambers, and on that D occasion certain sheets of his banking account at Lloyds Bank, Law Courts Branch, were produced. It was then explained to Nathaniel Rothfield that all relevant entries must be disclosed, and he was told to go through the account carefully and disclose such items, but the decision as to what was relevant was left to him. No further discovery E had been made by May 24, and Messrs. Peacock & Goddard wrote again to Elman demanding full disclosure of relevant documents and pointing out the necessity for the disclosure and inspection of counterfoil cheque books, bank books and pass-books, paying-in books or any other books of account, and sending an extract from a copy of the account of Horwood F & Co. at Lloyds Bank, Holborn Circus, showing numerous payments therefrom to Rothfield, and certain payments to Elman himself.

A further affidavit of Nathaniel Rothfield was sworn on May 29, 1937. It disclosed a large bundle of correspondence, including matters dealing with the purchase of Consolidated Gold Alluvial shares, and showed G also an account between Nathaniel Rothfield and Horwood & Co. and his pass-book at Lloyds Bank, 222, Strand, "relevant entries only." The documents, when perused, showed that Nathaniel Rothfield had at least one other banking account, which had not been disclosed, but the main complaint with regard to the second affidavit is in regard to the H items disclosed under the phrase "relevant entries only."

According to Osborn, the matter was dealt with in this way. The documents were not seen by him until just before the affidavit was sworn—so late, indeed, that there was not time to put them into proper chronological order in the affidavit. The pass-book, he says, did not reach him until the very morning for which inspection had been arranged

—namely, June 8—and, on receiving the book, he observed that Nathaniel Rothfield had marked, either with an asterisk, a cross or by strokes, the items that were to be disclosed. He says that he had not himself time to examine the book, as he had another appointment, and he therefore instructed a clerk to cover up all items except those marked in the way described. He was not at all times clear as to the time during which the book was in his possession. In chief, he said that he had the book from about the end of May until about the middle of June, so far as he could recollect. On cross-examination, he repeated the same allegation, but, on the hearing before your Lordships' house, we were told that the book was not received until the morning of June 8, and, in support of this allegation, a letter of June 7 from Nathaniel Rothfield was produced. The last date may be correct, but it does not appear what was the exact date at which the pass-book was taken away by Nathaniel. Osborn said that, once the irrelevant items had been sealed up, he did not see the book again, but he told Nathaniel to make sure there were no relevant items undisclosed.

The appellant's solicitors continued to press for further discovery, and in November Osborn, who said he was having difficulty in getting full discovery from Nathaniel, took him to see Elman himself. On that occasion, Nathaniel did inform Elman that he had six banking accounts, three, however, dealing with Mushroom Farmers Association, Ltd., and two only being material. Four days later, an order for a further affidavit of documents was obtained by the appellant's solicitors on Nov. 18, 1937. A third affidavit was then sworn which gave full discovery, and no complaint was made of it. It is plain, however, from an inspection of the pass-book and the statement of account between Nathaniel Rothfield and Horwood & Co., that many items of importance were not disclosed in the second affidavit. The case was ultimately tried before Singleton, J., and a jury, and a verdict and judgment given against all the defendants for the full sum claimed and costs. Before the trial, Nathaniel Rothfield had sailed for the West Indies, on the plea that he was suffering from a nervous breakdown, and an application was made to postpone the trial until his return. This application was supported by an affidavit by a doctor, and a short postponement was granted, but not such as to enable Nathaniel Rothfield to take part in the trial, even if he desired to do so. The only party represented at the trial was Norman Baron Rothfield, against whom the jury also found a verdict. At the end of the case, counsel for the appellant applied that the several solicitors representing the various defendants should be ordered to pay the plaintiff's costs of the proceedings. On this application, Singleton, J., gave leave to apply to fix a time at which the application should be heard, and gave instructions that notice should be given to those concerned of the facts relied upon as justifying the application, so that they might have an opportunity of meeting the case made against them. Such notice was duly given, and the particulars, so far as Elman was concerned, may be substantially summed up in the words of the judge in his judgment as (i) the filing of defences which Elman knew to be false, and persisting in those defences, and (ii) questions of discovery. SINGLETON, J., absolved the respondent from any liability on the first ground, his short reasoning, with which I agree, being that, though a solicitor may suspect his clients, they are entitled to say, "I deny any fraud," to have that defence placed on the record, and the fraud proved, and that, in any case, the quantum of damages must be ascertained. As to discovery, however, he found the respondent guilty of professional misconduct, and ordered him to pay one-third of the taxed costs of the action and two-thirds of the costs of the application. The misconduct alleged in the particulars supplied was as follows:

> DISCOVERY.
>
> In the light of the knowledge which the respective solicitors had of the business conducted by their clients and of the position and relationship of their clients and of the existence of material documents which were or had been in the power, possession or control of their several and respective clients, each of the solicitors were guilty of misconduct in preparing and advising or permitting their clients to make and file affidavits of documents which were wholly inadequate and obviously false.

Upon this matter, the judge's finding is expressed in these words:

> In allowing the two earlier affidavits to be sworn and put on the file I believe the solicitor was allowing something to be done which he knew to be wrong. In resisting further discovery, particularly in regard to the Lloyds Bank account, he was obstructing the interests of justice, he was adding to the difficulties of the plaintiff, and he was causing delay in a case in which one must realise the importance of the plaintiff's getting judgment speedily, if she was entitled to judgment.

It does not appear clearly from the finding of the judge whether he imputes blame to both the solicitor and his clerk or whether the clerk only is censured and the solicitor punished for his servant's misdeeds. In these circumstances, I think one must treat the solicitor as free from personal misconduct. This, indeed, was the view of a majority of the Court of Appeal, before whom the wrongdoing of the clerk is assumed, but it was held, nevertheless, that no liability was imposed upon the solicitor in the absence of personal misconduct. Before your Lordships' House, not only was this view supported by counsel for the respondent, but it was also strenuously maintained that in any case no misconduct had been proved, even in the case of the clerk. So far as the first point is concerned, I agree with the opinion which all your Lordships have expressed. The courts of this country have for long exercised disciplinary jurisdiction over their officers, whether described as attorneys or as solicitors. Indeed, it was not until the Solicitors Act, 1888, that a Committee of the Law Society was charged with investigating complaints against solicitors and reporting their decision to the court, nor until the Solicitors Act, 1919, that the Law Society was given power to deal with the delinquencies of its own members. The court, however, continued to exercise a concurrent jurisdiction, which was preserved by the Solicitors Act, 1932, s. 5 (1), and most lately asserted in *Brendon* v. *Spiro* (12). That jurisdiction was exercised over the solicitor upon the record, and was not confined to cases of personal misconduct only, e.g., in *Norton* v. *Cooper, Re Manby & Hawksford, Ex p. Bittleston* (5), Hawksford, a member of a firm of solicitors, was held responsible to the court, though it was not suggested that he was guilty of personal misconduct or neglect of duty, and though his only knowledge of the case was that there was such a suit, which his partner Manby was conducting. In that case, the court was exercising its summary jurisdiction over its officers, and the argument was expressly presented and rejected that such jurisdiction extended to relief only in cases of personal misconduct and neglect of duty.

So, too, in *Re Ward* (13), a solicitor was ordered to make good the loss incurred by reason of his London agent having represented that a receiver had entered into the usual recognisances when in fact he had not done so. In this case also the court was asked to exercise, and did exercise, its summary jurisdiction over the country solicitor, though it was contended that it had no power to fix a solicitor with the consequences of professional misconduct except on the application of his client, and that the remedy, in any case, if there were one, was against the London agent. Whether one regards the liability of the solicitor as arising from a failure to exercise due supervision over his representatives or because he is responsible as the solicitor upon the record, the result is the same. It is misconduct in the way in which the work entrusted to his firm is carried on, not the personal misdoing of the individual, which gives rise to the exercise of the jurisdiction. No doubt the penalty imposed will vary according to the circumstances of the case, and it may be that the more serious cases, involving such personal misconduct as would result in the penalty of suspension or expulsion, would now be left to the jurisdiction of the Law Society, but the court still retains its summary jurisdiction, and will exercise it in appropriate circumstances. The majority of the Court of Appeal took the view that, unless personal misconduct was established, the court's only power under its summary jurisdiction to make the solicitor answerable for the costs of the other side was in cases where he had represented himself as having authority to act on behalf of a client when in fact he possessed no such authority, or in analogous cases. *Yonge* v. *Toynbee* (14) and *Simmons* v. *Liberal Opinion, Ltd., Re Dunn* (15) are examples of the former, and *Re Eyre, Palmer* v. *Evans* (7), where the client had paid an excessive sum for costs owing to the misrepresentation of the solicitor's clerk, and *Dunkley* v. *Farris* (6), where the clerk had forged the seal of the court to the writ, were said to be examples of the latter.

The occasion of the court's action in cases of this kind no doubt is the wrongful receipt of money or the breach of warranty of authority, but it is difficult to see how such acts would give the court any authority to make an order against the solicitor in the original action except by virtue of its summary jurisdiction over his conduct. He is no party to the action, nor is any claim being made against him by his own client.

With all respect, I do not assent to the view of Greer, L.J., as he then was, that the solicitor can himself be treated as a party to the action because he has misrepresented himself as authorised to act for one party to the action, and that he can therefore be made liable for the costs that have been incurred at the time when there was no defendant. I think the principle is more accurately stated by Swinfen Eady, J., as he then was, in *Yonge* v. *Toynbee* (14), at p. 234:

> . . . whatever the legal liability may be, the court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action, warrants his authority.

In other words, the court is not enforcing a civil right, but is exercising its authority over the conduct of its officer.

Though in more recent cases the commonest occasion for imposing a liability for the payment of the costs of his opponent is in circumstances where he has assumed an authority which he did not possess, I cannot find that either principle or authority has confined the imposition of that obligation to such cases. However, though the solicitor be liable for the action of his clerk, the question still has to be determined whether the clerk himself was guilty of any professional misconduct. Of course, no question of misconduct relevant to the present case does, nor could, arise in reference to the proceedings in the cases brought by Lady Chichele Plowden or Still. Those proceedings are only material by way of a warning that discovery in the Myers action was of importance, and should be carefully considered.

I say nothing of Nathaniel Rothfield's first affidavit, since it is possible, though unlikely, that, in spite of the letter of Feb. 24, 1936, he had never had anything to do with Horwood & Co., never had any dealing with Gold Alluvials shares, and, therefore, had neither documents nor bank accounts which were relevant. Before the second affidavit was sworn, however, it had been ascertained that his denials of any connection were untrue, and that a mass of documents and accounts existed which were relevant and had not been disclosed. Indeed, apart from the discovery of the defectiveness of the first affidavit, there was ample warning of the need of care. Elman himself agreed that the decision whether the entries in a pass-book should be disclosed ought not to be left to a twenty-year-old client, but should be determined by a solicitor or his managing clerk, and had said that, after he received in Apr., 1937, the letters disclosed in Morser's statement of claim in the third-party proceedings, he realised that something was wrong. Moreover, Osborn said that, if he had realised that £54,000 had passed through Nathaniel's banking account in 16 months, he would probably have thought it material. It is plain that some sheets of the pass-book were examined with counsel, that the pass-book was in Osborn's hands for about a fortnight, and that for months the opposing solicitors were pressing for further discovery, and yet until a further order was made in December nothing was done.

The judge's conclusion was that Osborn had examined the books and yet had failed to disclose the further relevant items. I cannot say that this conclusion was unjustified merely because Osborn denied the examination. The book was in his possession, he had had warning of the materiality of full disclosure, and ample opportunity of examining it, if he chose to avail himself of it. His excuse was that he meant to go through it later, and that meanwhile Nathaniel took away the book in order to see if there were any further material items. Possession of the book, opportunity, and warning of materiality and of the need of care, combined with a duty to ascertain that the client fully understood the obligation imposed upon him, seem to me to be enough to warrant the judge's finding, arrived at after an opportunity of seeing the witness in the box. In any case, I do not consider that the solicitor or his clerk has fulfilled the obligation of supervising to the best of his ability the swearing of a full and complete affidavit of documents by permitting the client to disclose part of a pass-book and to withhold the rest by the use of the phrase "relevant entries only." Until it is known to him what those relevant entries are, disclosure is not complete. It is still the duty of the clerk, in such circumstances, himself to examine the book and see that the relevant items have been disclosed. That indeed was, as I have indicated, Elman's own view. The two earlier affidavits of Nathaniel Rothfield were wholly inadequate, and the clerk in charge of the case must either have known the defectiveness of the second, as the judge has found, or have been grossly negligent in failing to acquire that knowledge. Either finding is, I think, enough to fix him and his employer with professional misconduct, and to justify the order made in the court of first instance.

Appeal allowed with costs. Order of Singleton, J., *restored.*

Solicitors: *Peacock & Goddard*, agents for *Edge & Ellison*, Birmingham (for the appellant); *Burnett L. Elman* (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

ALDHAM *v.* UNITED DAIRIES (LONDON), LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., MacKinnon and du Parcq, L.JJ.), **November 24, December 11, 1939.**]

Animals—Liability of owner—Negligence—Ordinary consequences of negligence—Scienter—Horse left unattended attacking passer-by.

The plaintiff was attacked and injured by the defendants' horse, which, attached to a milk-cart, had been left unattended for half-an-hour in a main thoroughfare. Evidence was given on behalf of the defendants that the horse was docile and quiet. The jury negatived *scienter* on the part of the defendants, but found them guilty of negligence in leaving the horse unattended, and awarded the plaintiff damages:—

Held: (i) there was abundant evidence to support the jury's finding that the defendants were negligent in leaving the horse for so long unattended.

(ii) the proper inference to be drawn from the facts was that the plaintiff's injuries were directly caused by that negligence of the defendants.

Cox v. *Burbidge* (1) *distinguished.*

Decision of HUMPHREYS, J. ([1939] 3 All E.R. 478) *reversed on the second point.*

[EDITORIAL NOTE. The Court of Appeal have agreed with HUMPHREYS, J., on the point that the respondents were negligent in leaving the pony so long unattended. They have, however, reversed his decision on the question of liability. Where an animal, having no known vicious propensities, attacks a human being, the owner is, in general, not liable, but, where it can be shown that the attack is due to an act of negligence on the part of the owner, he does not escape liability by reason of the doctrine of *scienter*, as it is usually termed. If a horse is left unattended for a long time, and is shown to have become restless by reason of the length of time for which it has been so left, then injury due to that horse's restlessness is caused by the negligence of the person so leaving it unattended.

AS TO NEGLIGENCE IN RELATION TO DOMESTIC ANIMALS, see HALSBURY, Hailsham Edn., Vol. 1, p. 542, para. 932; and FOR CASES, see DIGEST, Vol. 2, p. 229-233, Nos. 201-220.]

Cases referred to:

(1) *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430; 2 Digest 233, *218*; 32 L.J.C.P. 89.

(2) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; 36 Digest 29, *151*; *sub nom. Polemis* v. *Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154.

(3) *Fardon* v. *Harcourt-Rivington* (1932), 146 L.T. 391; Digest Supp.

(4) *Sycamore* v. *Ley* (1932), 147 L.T. 342; Digest Supp.

(5) *Deen* v. *Davies*, [1935] 2 K.B. 282; Digest Supp.; 104 L.J.K.B. 540; 153 L.T. 90.

(6) *Rose* v. *Collier* (*George Hurry*), *Ltd.*, [1939] W. N. 19; Digest Supp.

(7) *Bradley* v. *Wallaces, Ltd.*, [1913] 3 K.B. 629; 2 Digest 236, *236*; 82 L.J.K.B. 1074; 109 L.T. 281; 6 B.W.C.C. 706.

APPEAL by the plaintiff from verdict and judgment at a trial before HUMPHREYS, J., and a common jury, dated June 26, 1939, and reported [1939] 3 All E.R. 478, where the facts are fully set out. The appellant applied for judgment to be entered in her favour or for a new trial.

Dudley Collard (*Robert Fortune* with him) for the appellant.

Cyril Salmon for the respondents.

Collard: One can claim against the owner of an animal in respect of injuries caused by it on two grounds: (i) that the animal was of a savage disposition and the owner was aware of the fact, and (ii) that the owner was negligent in the control of the animal. The present case belongs to the second class. The horse should not have been left without anyone in charge of it. The animal was perfectly docile, but there was negligence in that the animal was not properly looked after. The present case is in accordance with the line of cases of which the most recent is *Rose* v. *Collier* (*George Hurry*), *Ltd.* (6). The appellant's injuries were the reasonable consequence of the negligence of the respondent's servant in leaving the animal unattended. There was knowledge that the animal was liable to get on to the pavement. The jury have found negligence, and have found also that the injury to the appellant was the direct consequence of that negligence. The judge, however, relied upon *Bradley* v. *Wallaces*, *Ltd.* (7) and *Cox* v. *Burbidge* (1), and entered judgment for the respondent company. *Cox* v. *Burbidge* (1) can be distinguished from the present case, because it was known in the present case that the horse was at the place in question and was likely to become restive.

Salmon : The animal put its feet on the pavement at this particular spot, but nobody could explain its reason for doing so. There was no evidence upon which a jury could reasonably find that there had been negligence. It was not negligent to leave the horse unattended, because 4 years' experience had shown that it was not likely to be dangerous. Even if there were negligence, it is necessary to show that that negligence was the natural and direct cause of the injury complained of : *Deen* v. *Davies* (5). If the possibility of danger is only a mere possibility, which would not occur to the mind of a reasonable man, there is no necessity to take precautions to guard against it : *Fardon* v. *Harcourt-Rivington* (3). In the present case, the duty of the respondent company is not an absolute duty, but is a duty only to guard against that which is reasonably apparent. In the case of a domestic animal, the owner is liable only on proof of *scienter*, as it is not natural for a domestic animal to bite mankind. *Prima facie*, it is not the nature of a horse to bite a person. No evidence was called to show that a horse which thrusts out its head is likely to bite a person. Even if there has been negligence, *Cox* v. *Burbidge* (1) is authority for saying that the biting must be in consequence of that negligence. The fact that the horse had its feet on the pavement did not make it likely that the appellant would be bitten. [Counsel referred to *Re Polemis & Furness, Withy & Co.* (2).]

Sir Wilfrid Greene, M.R. : I have read the judgment prepared by du Parcq, L.J. I am in entire agreement with it, but I think it desirable to express in my own language certain conclusions to which I have come.

To leave a horse and cart unattended on a highway is not, without more, an act of negligence. On the other hand, to leave a horse and cart upon a highway in circumstances in which the driver either knows, or, as a reasonable man, ought to know, that the horse is likely to injure a member of the public is unquestionably negligence. This the jury must be taken in effect to have found in the present case, the particular circumstance being the restiveness of the pony. The jury must, I think, have meant that, in view of the known habit of the pony, the driver ought to have known that it became restive, and a driver who knowingly leaves a restive pony unattended is justly held guilty of negligence.

Upon the question of remoteness of damage, the answer, upon the facts of this case, appears to me to be free from doubt. If the act of negligence consists in leaving unattended on the highway a pony known to become restive, the owner is liable for all damage attributable to its restiveness, whether such damage is due to a casual, mischievous or malevolent movement on the part of the pony. If, on the other hand, the movement is one which is not connected with the restiveness at all, the damage cannot be said to be caused by the negligence. In the present case, I think that the jury's findings necessarily imply that, in their opinion, the damage was caused by the act of negligence which I have described, and I agree that there was ample evidence to support such a conclusion.

Cox v. *Burbidge* (1) was a very different case. There the negligence alleged consisted merely in allowing the horse to escape. The only fact relied upon to establish this alleged negligence was the presence of the horse on the highway, and, as this was equally consistent with due care on the part of the defendant, the action failed. ERLE, C.J., said further that, even if the negligence alleged were to be taken as established, the damage could not be referred to the act of negligence. It is important to observe that the negligence alleged was not the act of allowing a horse to escape in such circumstances that a reasonable man ought to have anticipated that it would cause injury to a person on the highway. It was the act of allowing it to escape *simpliciter*. Accordingly, the action of the horse in kicking the child fell to be considered, not in connection with the existence of negligence at all (for the probability of its kicking was not a relevant consideration in regard to the negligence alleged), but in connection with the question of remoteness of damage. If the case had been one where the negligence alleged had consisted in (*a*) leaving a horse and cart unattended on the highway—an act not *per se* negligent—(*b*) in such circumstances that a reasonable person ought to have foreseen that it might kick a passer-by, the act of kicking would have been the direct consequence of the negligence. As it was, the act of kicking was not due to the alleged negligence, although that negligence (on the assumption that it existed) gave the horse the opportunity of kicking—an altogether different thing.

In dealing with questions relating to animals, it must be borne in mind that an animal is capable of spontaneous action. If a man negligently relaxes his hold on an inanimate object, he is liable for the damage which it causes, since that damage is the consequence of the act of negligence. If, however, a man negligently relaxes his hold on an animal, it does not necessarily follow that he is liable for the damage caused by the animal in its state of freedom, for that damage may be due to a spontaneous act of the animal for which the want of care gives the opportunity, but of which it is not the cause. Thus, if a man leading a spirited horse in a country lane negligently allows it to escape from his control, and it breaks into a gallop and knocks a person down as it rounds the next corner, the damage may truly be said to be caused by the negligence, for it is natural for such a horse to gallop away, and a free galloping horse is likely to knock a person down in such circumstances. The damage in such a case is not too remote. If, on the other hand, the horse, having no known vicious propensities, celebrates its freedom by biting a passer-by, the position is quite different. It is true that, if it had not been allowed to go free, it would never have bitten the passer-by, but, as there is no probability that such a horse will bite a passer-by merely because it is set free, the damage is attributable, not to the act of negligence in allowing the horse to go free, but to a spontaneous act of its own for which the act of negligence merely gave the opportunity. *Cox* v. *Burbidge* (1), on the assumption that the defendant there was negligent A in allowing the horse to escape, was a case of this class. The appeal is allowed.

MACKINNON, L.J.: I have had the advantage of reading the judgment that has just been read by SIR WILFRID GREENE, M.R., and B the judgment of DU PARCQ, L.J., which I am about to read, and I do not think I can usefully add anything to what they have said.

DU PARCQ, L.J. [read by MACKINNON, L.J.]: In this case, the plaintiff, Miss Aldham, claimed damages for negligence against the C defendants, who were the owners of a pony which, while unattended on the highway, had so behaved as to cause her injury. She said that, as she walked past it on the pavement, it "jabbed out" at her, bit her face, caught her by the coat and dragged her down, and then "pawed her with its feet." The action was tried by HUMPHREYS, J., D and a common jury. The judge left specific questions to the jury. By their answers to the first two questions, the jury accepted the plaintiff's account of the occurrence. The remaining questions and answers were as follow:

> Had the defendants any knowledge of any propensity on the part of the horse E to attack human beings?—No.
>
> In the circumstances of the case, were the defendants negligent in leaving the horse unattended?—Yes, knowing that the horse had a habit of straying on to the foot pavement. Damages, £300.

The judge, after hearing argument, directed that judgment should be entered for the defendants, and against this decision the plaintiff appeals. F

Evidence, which the jury must be taken to have believed, showed that the pony which injured the plaintiff had been left in the roadway, attached to a milk-cart and unattended, for about half-an-hour, while the defendants' roundsman was delivering milk. It was the usual practice of the defendants' servants so to leave it, and there was evidence that it G was the pony's habit to become restive, to put his forefeet on the pavement, and to behave in a way which, to some persons at least, was alarming. One witness, a governess, said that she had "many times" noticed that the pony was "restive and difficult," and had seen him "get his two paws across the path, which made it tiresome to get by, H and, in fact, fearful." "He has," she said, "a way of scraping the pavement or the ground with one foot and moving his jaw about." The plaintiff herself had noticed the pony on previous occasions, and said: "If it is restless, it just jabs out. It gets tired of waiting." The pony's habit of putting its forefeet on the pavement was known to, and admitted by, the defendants' servants, but they gave the pony a good character, and attributed to it a docility amounting to stolidity.

It may now be regarded as elementary law that, in an action for negligence, the plaintiff must prove, first, that the defendant as a reasonable man ought to have foreseen that the act or omission complained of might cause damage, and, secondly, that the negligent act or omission directly caused the damage suffered by the plaintiff. If negligence is proved, the defendant is liable for damage caused by his negligence, even though he could not have been expected to foresee the exact kind or the "type" of damage which was caused in fact: *Re Polemis & Furness, Withy & Co.* (2), *per* Bankes, L.J., at pp. 571, 572, and *per* Scrutton, L.J., at pp. 576, 577.

These general principles are no less applicable to a case in which the negligence alleged is failure to control a horse than to one in which the negligence is in the management of a motor car or of any other inanimate object. They must, however, be applied with proper regard to the limitations which the common law has placed on the liability of the owner of an animal *mansuetae naturae*, such as a horse. Where it is sought to impute liability to a defendant for the conduct of a living creature, capable of spontaneous action, it has been found necessary to lay down rules which prevent a jury from attributing to the reasonable man a degree of foresight which would anticipate every mischievous act of which an animal, hitherto docile, might conceivably be guilty, or from regarding the release of such an animal from custody or control, without more, as the direct cause of any violent departure from its accustomed docility which may ensue. Everyone knows that even a well-behaved animal may conceivably be guilty of such a sudden lapse, but, if everyone were obliged to be constantly vigilant through his fear of such a misfortune, which the experience of mankind shows to be most improbable, it would hardly be safe ever to let a horse out of its stable.

For the purpose of this case, the established rules may be stated as follow. (1.) Negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do something contrary to its ordinary nature. (2.) Even if a defendant's omission to control or secure his horse is negligent, an act on the part of the horse which is contrary to its ordinary nature cannot be regarded, in the absence of special circumstances, as being directly caused by such negligence.

Authority for these propositions is to be found in the judgments of the Court of Common Pleas in *Cox* v. *Burbidge* (1). It was argued on behalf of the respondents that the decision in *Cox* v. *Burbidge* (1) went further, and that, whatever negligence there might be in leaving a horse unattended in the circumstances of a particular case, the fact that it had hitherto been well-behaved would always make it impossible to hold that its owner was responsible for damage due to such mischievous acts as biting or kicking. This contention appears to me to give no weight to the last two words of a sentence in the judgment of Erle, C.J., at p. 437, which was much relied on :

> It reduces itself to the question whether the owner of a horse is liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse, without more.

It is also to be observed that in *Cox* v. *Burbidge* (1) the horse had kicked the plaintiff, in the words of Erle, C.J., [p. 438] " without anything to account for it." In such cases as this, it is always necessary to remember that, in the words of Lord Atkin in *Fardon* v. *Harcourt- Rivington* (3), at p. 392 :

> . . . quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour . . .

See *Sycamore* v. *Ley* (4), *per* Greer, L.J., at p. 345, *Deen* v. *Davies* (5), *per* Slesser, L.J., at p. 288, and the recent decision of this court in *Rose* v. *George Hurry Collier, Ltd.* (6). The judgments in *Deen* v. *Davies* (5) all emphasise the importance of giving due weight to the precise circumstances of the particular case, especially the judgment of Singleton, J., at pp. 297-299.

In the case before us, the judge was of opinion that there was evidence to support the jury's finding of negligence. The respondents' counsel contended that the judge's decision was wrong in this respect, but, in my view, it was clearly right. Speaking of the relevant answer of the jury, the judge said, at p. 481 :

> I think that what the jury meant by that was that that was an indication at least that the horse was getting tired, restive, and restless.

This is, in my opinion, a fair view of the jury's meaning, and, on that view, there was abundant evidence to support their finding. A horse's temper, however equable, may break down under a strain, and it may well be negligent to put an undue strain upon its patience.

The only question left is whether, in all the circumstances, the plaintiff's injuries can be said to have been directly caused by the defendants' negligence. It is true that no specific question was left to the jury as to this, but it is conceded (and no doubt rightly conceded) that the jury's verdict, with its award of damages, was intended to include a finding that the injuries were so caused. It was contended by counsel for the respondents that there was no evidence to support such a finding. In my view—and in this respect I am unable to agree with Humphreys, J. —there was ample evidence to support it. The facts here were very different from those in *Cox* v. *Burbidge* (1). If a horse is not likely to bite or kick when it is at liberty in a field, it is impossible to say " without more " that it will be likely to bite or kick if it strays from the field on to a road. When a horse has been left unattended for so long that it has become restless and irritable, a jury may well think that an injury which it does to a foot-passenger in its nervousness or annoyance is

directly caused by the negligence of those who have failed to take proper care of it. The facts of the present case, in my opinion, fully justified the inference that the plaintiff's injuries were directly caused by the negligence of the defendants' servant in leaving an impatient horse unattended for too long a time. It follows, in my opinion, that, on the
A jury's answers, the plaintiff was entitled to judgment, and I think that her appeal should be allowed, that the judgment entered for the defendants should be set aside, and that judgment should be entered for the plaintiff for the sum of £300 with costs. The plaintiff should also have the costs of this appeal.

B *Judgment for the plaintiff for* £300 *with costs in both courts.*

Solicitors: *W. T. Iggulden* (for the appellant); *Blount, Petre & Co.* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

C

CAMPBELL *v.* CAMPBELL.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **December 1, 1939.**]

D *Divorce—Discovery—Conduct conducing—Documents relating to association of husband with named women—Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49) *s.* 198.

The husband petitioned for dissolution of the marriage on the ground of adultery, and the wife cross-petitioned. The wife, in her answer, admitted acts of adultery with one of the co-respondents, but alleged,
E *inter alia*, that the petitioner had conduced to her adultery by consistently neglecting her and by habitual association with certain named women in spite of her protests. The husband did not disclose, in his affidavit of documents, any documents bearing on his association with the women. The wife disclosed several such documents in her possession, and asked for a further and better affidavit by the husband.
F The registrar ordered such disclosure in relation to three classes of documents concerned with that association: (*a*) correspondence with the women, (*b*) invoices and cheques, and (*c*) correspondence with and payments to one of the women. The judge limited this order to such of the documents as were disclosed in the wife's affidavit on the ground that no document, which had not come to the knowledge of the wife, was relevant to the issue of conduct conducing. The cross-petition
G did not allege adultery with any of the women mentioned in the allegation of conduct conducing:—

HELD: the essence of the plea was association, and not adultery, with the women in question, and the fundamental fact to be proved was the existence of that association. The registrar's order was, therefore, the right one and ought to be restored.

H **[EDITORIAL NOTE.** It is, of course, clear that, in proceedings instituted in consequence of adultery, no one is to be asked any question tending to prove he or she has committed adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery. It was said that to allow the discovery here asked for would be in contravention of the spirit of the above statutory enactment. The contention, however, has been rejected by the Court of Appeal, because the acts of the husband complained of as conducing to the wife's adultery were not adultery, but association, with the women. The complaint is that the existence of this association caused the husband to neglect the wife.

As to Discovery in Divorce, see HALSBURY, Hailsham Edn., Vol. 10, pp. 727, 728, para. 1116; and for Cases, see DIGEST, Vol. 27, p. 425, Nos. 4308-4315.]

Cases referred to: A

(1) *Cavendish* v. *Cavendish*, [1926] P. 10; 27 Digest 425, *4313*.
(2) *Redfern* v. *Redfern*, [1891] P. 139; 27 Digest 263, *2317*; 60 L.J.P. 9; 64 L.T. 68.
(3) *King* v. *King* (1850), 2 Rob. Eccl. 153; 27 Digest 426, *4324*.

Appeal by the respondent from an order of Henn Collins, J., dated Oct. 23, 1939. The facts are fully set out in the judgment of Sir Wilfrid B
Greene, M.R.

R. F. Levy, K.C., *R. Bush James, K.C.*, and *Ifor Lloyd* for the appellant.

W. Latey for the respondent.

Levy, K.C.: The petitioner's affidavit contains no reference to any documents which have passed between the petitioner and the women. C
The respondent herself was in possession of a considerable number of letters and other documents which had been written by or to these women. They included invoices for jewellery and receipts. These documents appeared in the affidavit. It seems, however, that other documents of a similar nature were in existence. Accordingly, the wife D
took out a summons asking for an affidavit of specific documents. They are (*a*) letters, and copies of letters, which passed between the petitioner and the women referred to, (*b*) invoices and receipts relating to gifts made by the petitioner to those women, and (*c*) cheques and the petitioner's pass-book showing payments relating to one of these women. E
The wife is entitled to all documents which passed between the petitioner and these women and which relate to the petitioner's association with any of them. A matter in the suit is whether or not the petitioner associated with these women. It appears that the judge took the view that, unless the wife had seen the letters, they could not have conduced F
to her adultery. The first thing the wife has to establish, however, is the association, and the letters have a bearing upon that, whether or not she saw them. It is not suggested that she was induced by the letters, but it is suggested that she was induced by the husband's conduct. It is an issue quite separate from the issue of adultery. The G
wife alleges a course of conduct which conduced to her adultery. The association may have been perfectly innocent, but it continued for a long time, and there was neglect of the wife by the petitioner. [Counsel referred to *Redfern* v. *Redfern* (2).]

Latey: The order asked for would be contrary, not only to the letter, H
but also to the spirit, of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 198. That section followed a long history of the law of divorce, which is set out in *Redfern* v. *Redfern* (2). No question can be asked of a party or of a witness, in proceedings instituted in consequence of adultery, which would tend to prove his own adultery. It is not

merely that the witness is not bound to answer, but that no such question shall be asked. It is a rule derived from the practice of the Ecclesiastical Court. The issue upon which discovery in the present case is sought is an integral part of proceedings instituted in consequence of adultery. Where there is an answer alleging adultery, as is frequently the case, the section refers to the answer just as much as it does to the petition. The cross-petition cannot be severed from the petition. The actions have been consolidated, and will be heard together. One cannot sever the charge of conduct conducing from the counter-charge of adultery. It would be oppressive to make an order with regard to paras. (*b*) and (*c*), because the matters referred to cover a period of 10 or 12 years. It would be unreasonable to require the petitioner to go through his records for so long a time to see if he has paid for presents to friends. [Counsel referred to *Cavendish* v. *Cavendish* (1) and *King* v. *King* (3).]

Sir Wilfrid Greene, M.R.: This is a case where the husband is petitioning for the dissolution of his marriage on the ground of adultery by the wife, and the wife, in her turn, has presented a cross-petition. The wife, in her answer to the husband's petition, while admitting acts of adultery with one of the co-respondents, alleged, among other things, that the petitioner by his conduct conduced to such adultery, and in the particulars of the conduct conducing she made the following allegation:

> The petitioner has consistently neglected the respondent and has been in the habit of associating with the following women in spite of the protest of the respondent . . .

Then there are set out particulars of the women referred to. The common form of order for discovery was made against the petitioner for discovery of documents relating to the matters in question in this cause save as to any issue of his adultery. When he came to make his affidavit, he did not disclose any documents bearing on his association with any of the women mentioned in the wife's answer. In her affidavit, the wife disclosed a number of documents bearing upon that association which she happened to have, or to have had, in her possession, and, in view of the absence of any documents of that kind in the husband's affidavit of documents, she made an application under R.S.C., Ord. 31, r. 19A (3), which gives the court power to order a party to state by affidavit whether or not any particular documents or classes of documents are, or have been, in the possession of that party. On that summons, the registrar made an order in relation to three out of four classes of documents in respect of which the application was made. The first class, lettered (*a*), consisted of correspondence between the petitioner and the women in question. The second class, lettered (*b*), consisted of invoices, cheques, pass-book entries, and so forth, referring to purchases made by the husband by way of gifts to these women. The third class, lettered (*c*), consisted of particular correspondence relating to one of them,

and other documents relating to payments in connection with that one.
Those were the three matters in respect of which the registrar ordered
an affidavit to be made. On appeal, HENN COLLINS, J., varied the
registrar's order by limiting the affidavit which the petitioner was to
have made to such of the documents specified as were disclosed in the
wife's own affidavit. In other words, she would get disclosure only A
in relation to documents which she already had, or had had, in her
possession. The grounds on which the judge imported that limitation
are not quite clear. It is suggested that he took the view that, on
the issue as to conduct conducing, no document could be relevant unless
it had come to the knowledge of the person alleging such conduct, B
because, if it did not so come to her knowledge, it could not have been
conducing. I cannot help thinking that the judge could not really
have taken that view, because it seems to me, as the allegation is not
that the conduct conducing consisted in bringing certain letters to her
notice, the mere fact that letters evidencing an association existed, C
whether or not they were brought to her notice, would be relevant
on the fundamental issue which has in the first case to be established—
namely, the existence of the association. The effect of that association
in conducing to her conduct must, of course, depend upon the extent
to which, and the form in which, the existence of that association came D
to her mind and influenced it. That might have come by letter or it
might have come by other ways, but the existence of that association
is a relevant matter, and I can see no ground for that reason for limiting
the order in the way in which the judge limited it.

The ground on which counsel for the husband argued that the order E
of the registrar should not be restored was that the discovery of these
documents would be contrary to the spirit, if not the language, of the
Supreme Court of Judicature (Consolidation) Act, 1925, s. 198, which
provides that a witness shall not be liable to be asked, or be bound to
answer, any question tending to show that he or she has been guilty of F
adultery (except in the circumstances stated) in proceedings instituted
in consequence of the allegation of adultery. I need not read the section,
because it is a very familiar one. He says that, although this particular
issue is put up by way of defence, and is not the issue of adultery which
is raised in the cross-petition of the respondent, the wife, because the G
adultery alleged in that cross-petition was not adultery with any of
the women named in her answer, the petitioner is not to be asked to
disclose documents which tend to show that he has committed adultery,
and it is said that disclosure of these documents will tend to show that.

It is to be observed that the allegation is not an allegation of adultery H
with any of these women, but is one of association with them, and I
certainly cannot accept the view that association with other women,
which does not amount to adulterous association, is irrelevant on the
question of conduct conducing. That cannot be so. Accordingly, the
allegation is not, on the face of it, an allegation of adultery, nor is it

necessary that it should be so. That being so, I cannot myself see any ground whatever for saying that sect. 198 has anything to do with the case. The matter has not even got to a point where the petitioner has sworn on oath that the discovery of these things will tend to show that he has been guilty of adultery. What the effect would have been if he had done so is neither here nor there, and I say nothing about it, but, unless and until such an affidavit was sworn, it would be impossible for this court to say that the production of these letters would tend to show that he was guilty of adultery.

Cavendish v. *Cavendish* (1), where the application was to discharge a subpœna *duces tecum* relating to documents in the possession of the respondent, was relied upon. The only issue in that case was adultery or no adultery, and, accordingly, either those documents were irrelevant to the case altogether or they were relevant to the issue of adultery, and, on that basis, the production of them would have been contrary to the section. In the present case, the allegation not being an allegation of adultery with these women, it is quite impossible for this court to treat it as if it were.

There was one other point that counsel for the respondent took. He suggested that the discovery was oppressive, at any rate with regard to classes (*b*) and (*c*). In my opinion, there is nothing in that, and, in the result, the appeal must be allowed and the order of the registrar restored.

SCOTT, L.J.: I agree.

MACKINNON, L.J.: I agree.

Appeal allowed with costs in both courts.

Solicitors: *L. A. Hart* (for the appellant); *Kenneth Brown, Baker, Baker* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Applied. WALKER *v.* WALKER. [1952] 2 All E.R. 138.

Distinguished. HOPES *v.* HOPES. [1948] 2 All E.R. 920.

SMITH *v.* SMITH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), **October 16, 27, 1939.**]

Divorce—Desertion—Parties continuing to live in separate parts of same house—Husband refusing suggestion of reconciliation—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 2.

The petitioner was married to the respondent in 1922, but subsequently, owing to quarrels between them, the husband withdrew from cohabitation with the petitioner, but continued to live with his mother in another part of the same house. There was no physical separation between these two parts of the house. In 1933, while the parties were still living in this way, though the husband's mother had died in the meantime, the petitioner issued a summons against the respondent complaining of wilful failure to maintain. This summons was dismissed, but the parties, at the suggestion of the magistrates, went before the probation officer, who made attempts to effect a reconciliation. The

wife was willing to be reconciled, but the husband rebuffed all such
attempts, and continued to live apart from his wife, though still in the
same house. It was contended on behalf of the petitioner that this
refusal, coupled with the earlier history, afforded a starting point for
a charge of desertion:—

HELD: (i) the petitioner had made out a case for desertion.

(ii) she was not precluded from asserting desertion by the mere fact
that the parties were residing in the same house, even though there was A
no physical separation between the different parts in which they were
living.

[EDITORIAL NOTE. It has been settled since *Powell* v. *Powell* (2) that desertion
could exist although both parties were living under the same roof, but in that
case they lived in two physically separated tenements. It is here decided that B
there can be desertion although the parties do not inhabit physically separated
tenements. The question in each case is whether in fact the parties have been
living together as husband and wife, and residence under the same roof raises no
more than a rebuttable presumption of this fact.

AS TO HOW FAR IT IS NECESSARY FOR SPOUSES TO LIVE APART, see HALSBURY,
Hailsham Edn., Vol. 10, p. 656, para. 965; and FOR CASES, see DIGEST, Vol. 27, C
pp. 308, 309, Nos. 2855-2867.]

Cases referred to:

(1) *Wily* v. *Wily*, [1918] P. 1; 27 Digest 276, *2460*; 87 L.J.P. 31; 117 L.T. 703.
(2) *Powell* v. *Powell*, [1922] P. 278; 27 Digest 309, *2860*; 92 L.J.P. 6; 128 L.T. 26.
(3) *Jackson* v. *Jackson*, [1924] P. 19; 27 Digest 308, *2852*. D
(4) *Driver* v. *Driver*, Unreported.

PETITION by wife for divorce on the ground of desertion for at least
3 years immediately preceding the presentation of the petition. The
facts are fully set out in the judgment.

B. Stuart Horner for the petitioner. E

S. E. Karminski for the King's Proctor.

SIR BOYD MERRIMAN, P.: I think perhaps I ought to say a word
about this case, because it was one about which I felt some difficulty
when the case came on in the first instance, and for that reason I F
adjourned it to enable the papers to be sent to the King's Proctor in
order that he might investigate the matter and assist the court. The
result of that has been that, not for the first time by any means, the
King's Proctor has been of the greatest possible assistance, and the
facts have been fully investigated. I am now satisfied I have been G
informed of every material fact, and, in addition to that, I have been
greatly assisted by the argument of counsel for the King's Proctor on
the law affecting the matter.

The parties were married in 1922, but, owing to quarrels which broke
out between them (which, for the purposes of this case, I am quite pre- H
pared to assume were not caused by the fault of the husband alone),
there came a moment when the quarrels became so acute that the
husband withdrew from co-habitation with his wife. At that time, they
were living in a house which belonged, I understand, to the husband,
the whole basement of which was occupied by the husband's mother,

After this particular quarrel, when matters came to a head, the husband left his wife's bedroom and actually made his home with his mother. That is to say, he lived in the basement, though he slept with his son, the son of the first marriage, as I understand it, on the first floor, leaving his wife in possession of the ground floor. There was no physical separa- A tion between these parts of the house, but from that time onwards it was impossible in any real sense of the word to describe the husband as living with his wife. The truth of the matter was that he was living with his mother, who inhabited the basement of the house. He neither expected nor desired, according to his own evidence, any services from B his wife, but did allow her, and continued to pay for over 8 years thereafter, the sum of £1 per week. It is said that he was in desertion during that time, and that allegation was based on the fact that, after this quarrel, the respective mothers intervened, and the wife said she was prepared to give him another chance, and the husband said that he had C finished with her, and thereupon went, as I have already said, to live in his mother's part of the house.

If the matter stood there, I should doubt whether it could fairly be said, having regard to the way in which this arrangement went on without intervention for over 8 years, that the wife had made out a charge D of desertion during that time. However that may be, I am not called upon to decide that. It is indisputable that the circumstances in which that state of things came about are relevant in considering the real point I have to decide—namely, whether or not there was desertion for the 3 years immediately preceding the presentation of the petition.

E I now come to the point which really was raised, and to the difficulty which has now been satisfactorily explained. For some reason or another, which is not very clear, in the summer of 1933 the husband suddenly stopped these payments which had been going on for over 8 years. Thereupon the wife, not unnaturally, took out a summons F against him for wilful neglect to maintain. This came on before the magistrates, and the wife was examined and cross-examined. The husband made out a case that he had withheld the payment because in effect his wife was rendering him no services for it. The magistrates dismissed the case on the merits. That unquestionably was an awkward G fact, having regard to the wife's present case that thereafter her husband was deserting her. I need say no more about the magistrates' decision than that the husband now admits that there never was any arrangement whatever that the wife should render services for this money. The only thing that had happened was that his mother had died at the end of H 1932, and it pleased him to think that, after that, although the wife was engaged in keeping herself and earning her living, she should come and look after him and minister to him for this same £1 per week, and he did not make any suggestion whatever that she should be paid anything additional for her services. He admitted in the witness-box that it never occurred to him that she had a point of view in the matter. However, the magistrates dismissed the case, and there is no more to be said about it.

If the matter had stood there, it would obviously be very difficult for her to maintain this case of desertion, having regard to that finding. However, it is now common ground that, after they had disposed of the case, the magistrates suggested, very wisely, that it should be possible for these people to be reconciled, and, therefore, they both went, at the magistrates' suggestion, to see the probation officer. The wife gave some evidence about that last time—not very full—and it was left in some doubt how the matter really stood, but, as the result of the investigations which have since taken place, it is now quite clear that what happened was this. The probation officer tried to effect a reconciliation. The wife said that she was ready and willing to make a fresh start, but the husband made it equally clear that he was not willing to take his wife back. He said that he said to the probation officer, as he said to me, that it would be no good at all, and he made it clear that he was not willing to make a fresh start. The probation officer was not satisfied with this, and tried to persuade him that he ought to make an effort. The matter was finally left on the husband's saying that he would think it over and would telephone to the probation officer next day. He never did telephone, and in effect maintained, as he maintains now, that no good would have come of attempting a reconciliation, and persisted in withholding from cohabitation with his wife. That, counsel for the petitioner says, and I think says truly, coupled with the earlier history, does afford a starting-point for this charge of desertion. It is true that after this abortive interview with the probation officer things went on, so far as the living accommodation was concerned, exactly as they had been before, save only that, the husband's mother being dead, there was no question of his living with her. Equally, however, he continued to live in the same circumstances. That is to say, he continued to live in the part of the house which had been occupied by the mother, and the wife continued to occupy the ground floor of the house by herself.

I am satisfied also by the wife's evidence that, though payments on a different basis were made and continued right up to the filing of this petition, there was no agreement or arrangement for the separation. He just announced that he was going to give her 5*s*. or 10*s*., as the case might be, and put that money on some place where she could pick it up without any word being said between them, and she just had to take it or leave it. She had no option in the matter. I entirely accept her evidence in that respect. That being so, it seems to me that she makes out a case for desertion, provided that the physical circumstances in which they were living were not such as to preclude her from saying that her husband had deserted her. I have considered *Wily* v. *Wily* (1), *Powell* v. *Powell* (2) and *Jackson* v. *Jackson* (3), to which counsel for the King's Proctor has called my attention. To take them in their order, *Wily* v. *Wily* (1) was a restitution suit in which the husband by letter had refused to give his wife any more in the way of matrimonial co-habitation than the husband has afforded in this case. He said in terms that though he would give the shelter and protection of his home he would not under any circumstances co-habit on the terms of their earlier married life. She might have her room without the slightest molestation, but he must be immune from any molestation from her. In the witness-box he went much further. He said he was willing to live with the petitioner and treat her as his wife, though he had no affection for her. It goes without saying that no order of the court could compel the rendering of marital rights. Hill, J., drew the plainest possible distinction between the state of things which the husband was offering in the witness-box and that which he had offered by letter. That which had been offered by letter was, he thought, a refusal of conjugal rights. Therefore, he made a decree for restitution. When one turns to *Jackson* v. *Jackson* (3), to which I need not refer in detail beyond saying that it is a case in which Sir Henry Duke, P., described the parties as living together in every other sense of the word except that the husband had refused conjugal rights. Hill, J., in recalling his decision in *Wily* v. *Wily* (1), referred also to *Driver* v. *Driver* (4). That case, I think, is interesting and helpful in deciding the present case. It was a case in which it was necessary to prove desertion for the whole period of 2 years, for only 1 year and 10 months of which had the husband actually lived away from his wife in circumstances which plainly amounted to desertion. It was shown, however, that in the first 2 months of the material 2 years he had insisted on sleeping in a separate room, had never spoken to the wife, had never answered her when she spoke to him, and, when she had asked why she was being so treated, had knocked her down. In those circumstances, Hill, J., found no difficulty in holding that, although they were in one sense of the word living together during those 2 months, that period could be counted as part of the material period of 2 years.

At the other end of the scale one has *Powell* v. *Powell* (2). In that case, though the parties were living actually under the same roof, they were living physically in separate tenements with separate entrances, and the husband was threatening to set up a separate establishment with another woman in the part of the house into which he had separated himself in the fullest sense of the word from his wife. That particular element is lacking in this case. On the one hand, it is quite impossible to describe these people as living together in the sense in which Sir Henry Duke, P., used that phrase in *Jackson* v. *Jackson* (3)—namely, in every respect except for the withdrawing of sexual intercourse. On the other hand, as I have said, there is not the element that they were living in establishments which were physically separate.

I have come to the conclusion that this case is on what I may call the *Powell* (2) side of the line rather than the *Jackson* (3) side of the line, and that, in circumstances in which it is impossible to describe the parties as living together—indeed, where the only element of living together is that they were actually existing in one house, though there was no physical separation between the parts of the house in which they were living—the case is one of desertion, and is not one in which the wife is precluded from asserting desertion by the mere fact that they A were residing in the same house. It is only because the mother had died in 1932 that at the material time it ceased to be true to say that the husband was living with the mother and not with the wife. In all other essential respects, he was living separate and apart from his wife in 1936, 1937 and 1938, as he had been doing before his mother died. B For these reasons, I think that the wife has made out her case, and I pronounce a decree *nisi*.

Decree nisi granted.

Solicitors: *Edgar H. Hiscocks* (for the petitioner); *The King's Proctor.* C

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

HANCOCK *v.* B.S.A. TOOLS, LTD. D

King's Bench Division (Atkinson, J.), **December 11, 1939.]**

Master and Servant—Remuneration—Wages during illness—Employee engaged at weekly wage fixed upon hourly basis—Trade custom.

The plaintiff was employed as a driller at 39*s.* per week plus a national E bonus of 16*s.* 6*d.* for a 47-hour week. A notice was conspicuously displayed at the works that such engagement was on an hourly basis. Evidence was also given that it was the custom of the trade that the employees in the work which the plaintiff was engaged to do received no pay when no work was done, whether that was by reason of sickness or by reason of a public holiday. The plaintiff was incapacitated by illness, and claimed wages for the period of such illness:— F

Held: where there is an engagement upon the terms that only work done shall be paid for, an employee is not entitled to wages during sickness.

Marrison v. *Bell* (1) *explained.*

[EDITORIAL NOTE. This was a test case to test the position of employees paid by the hour and engaged in occupations where it has not been the custom to pay G during periods of sickness or periods when for any reason there is no work for the employee. It has been thought that such employees could, after the decision in *Marrison* v. *Bell* (1), claim to be paid during periods of sickness, but it is here explained that this is based upon a misapprehension of the decision in that case. Where the consideration for the wages is the work done, there is no implied term for payment during sickness. The implication can only arise where payment is made H for a week or some longer period of service irrespective of whether there is full work, or, indeed, any work, performed by the employee. That is not to say that such implication will be made only in the latter case. It may still be shown that there was a custom or express agreement to the contrary.

As to Wages during Sickness, see HALSBURY, Hailsham Edn., Vol. 22, p. 134, para. 222; and for Cases, see DIGEST, Vol. 34, p. 86, Nos. 631-640.]

Cases referred to:

(1) *Marrison* v. *Bell*, [1939] 2 K.B. 187; [1939] 1 All E.R. 745; Digest Supp.; 160 L.T. 276.

(2) *Petrie* v. *MacFisheries, Ltd.*, [1939] 4 All E.R. 281; Digest Supp.

(3) *Cutter* v. *Powell* (1795), 6 Term Rep. 320; 34 Digest 88, *649*.

ACTION for arrears of wages alleged to be due for a period when the plaintiff was incapacitated by sickness. The defence relied upon the fact that the plaintiff was engaged by the hour and was to be paid at an hourly rate, and that, by the custom of the trade, employees engaged upon the terms upon which the plaintiff was employed were not entitled to wages during sickness and were only paid for the hours actually worked.

The plaintiff entered the service of the defendants as a radial driller on Sept. 2, 1937. He was paid a weekly wage of 39*s.* with a national bonus of 16*s.* 6*d.* per week, which payments were based on a 47-hour week. It was given in evidence that employees engaged upon the same work as the plaintiff did not receive payment for public holidays or for periods of sickness. The plaintiff claimed wages in respect of two periods of sickness for which he had received no payment. A notice in the following terms was conspicuously displayed at the works:

TERMS OF EMPLOYMENT.

Employees (other than staff) are engaged on an hourly basis. Employment may be terminated either by the company or the employee on giving one hour's notice.

The plaintiff was, in fact, employed on piece-work all the time he was with the defendants, except the first two or three days. All remuneration was fixed in the following way. At the end of the week his piece-work earnings were calculated. If the total exceeded what he would have earned at time rates plus overtime, he was paid the excess; but he always received at least what he would have received at time rates.

A. J. Long, K.C., and *P. B. Morle* for the plaintiff.

W. H. Cartwright Sharp, K.C., and *Eric Blain* for the defendants.

ATKINSON, J.: This is an action which has been brought, I think, through a misunderstanding of what was decided in *Marrison* v. *Bell* (1). There have been two lines of cases running side by side from time immemorial. One line of cases consists of those in which an employee has been held to be entitled to be paid even while he is away ill, and the bulk of the cases in which that has been decided are cases where a man has perhaps been employed at so much a year or so much a month, or something of that sort, and where the consideration for the salary has been the readiness and willingness to work if of ability to do so. On the other hand, side by side with that line of cases, there have been existing cases where it has been held that the pay is the consideration for the work done, and, if work is not done, the wages have not been earned. The question in every case must be: What were the terms of the employment? Under the contract of employment, was the consideration to be work actually done, or was it to be a readiness and willingness to do work if of ability to do it ? I repeat what I said the other day in *Petrie* v. *MacFisheries, Ltd.* (2)—namely, that the law is correctly stated in Smith's Leading Cases, pp. 48, 49, in the note to *Cutter* v. *Powell* (3). If one looks at the judgment of du Parcq, L.J., in *Petrie* v. *MacFisheries, Ltd.* (2)—and I refer to that because du Parcq, L.J., was a member of the court that approved the decision in *Marrison* v. *Bell* (1)—it will be seen that he makes it very clear that in every case it is a question of ascertaining what the real terms of the contract are. The only point that had to be decided in *Marrison* v. *Bell* (1) was whether or not the position was affected by the National Health Insurance Act. They said that it was not. The mere fact that a man was getting National Health Insurance did not deprive him of his right to be paid while he was away ill if he had that right under his contract. There were passages, however, which, picked out and looked at merely apart from contracts, did seem to lay down that it was a question of law, and that, as a matter of law, a man was entitled to be paid while he was away ill, when in truth that is not the case. It is a question of fact as to what is the meaning of the contract.

The position here is really too clear for words. The plaintiff himself has been in the engineering industry for 40 years, and he was quite frank about what the position was. He said :

> I have always understood that you got no pay while you were away ill.

For 40 years that has been his understanding of the position—no work, no pay. When he went and applied for work at the defendants' works in Birmingham, he was employed on terms which I think may be fairly described as terms with an hourly basis. That means that his pay was based on so much per hour. It was a well-recognised rate. It worked out at so many shillings per week of so many hours, but it was all on an hourly basis, and this hourly basis had to be ascertained and known for the purpose of calculating overtime. The rules as to how overtime was calculated were perfectly well known to the plaintiff. Each of the first 2 hours counted as an hour-and-a-third, and so on, but that an hourly basis was at the bottom of it is perfectly clear.

I have had other witnesses from the defendants, namely, Addicott and Grove, people who have been with the defendants for many years. They say that the terms of employment are perfectly clear and perfectly well understood by everybody, and that they have never heard a man suggest that he was entitled to pay while he was away ill. Sir Alexander Ramsay, the director of the Federation of Engineering and Allied Employers, has been in the trade for 40 years, I think he said, the last 18 years on the employers' side, to adopt the expression of counsel for the plaintiff. He has never heard of such a claim. Then Ellis, for 27 years in this particular firm, told me that at all times an average of 15 to 20 men were away ill, and said that he had never heard anyone suggest that he was entitled to be paid while he was away ill.

It seems to me really too clear for argument. It is perfectly plain that it was a term of this man's employment that he should only be paid for the work he did. I am satisfied that that is the custom of the whole of this particular trade or industry, on the evidence which I have had, and that the plaintiff understood it, as he frankly admits, as well as anybody.
A Then comes the decision which leads him or somebody to suggest or to think: "I find now that all these 40 years that I have been in the trade I have been wrong. That is a matter of law. I have been entitled to something, and now I am going to claim it." Whoever so advised him must have misunderstood what the law is. It is not a matter of law at all.
B It is a question of fact. In every case, one has to get at what the terms are, and I am quite satisfied that the terms here were that he was only to be paid for work he had actually done. Therefore, there will be judgment for the defendants. They take up a very kindly attitude on the question of costs. They wanted the matter determined in the High
C Court, and I see there are letters in which they agreed that they would even pay the plaintiff's own costs if the action came to the High Court. There is an undertaking as to that, so I merely give judgment for the defendants.

Solicitors: *T. D. Jones & Co.*, agents for *Lyon Clark & Co.*, Smethwick
D (for the plaintiff); *Joynson-Hicks & Co.*, agents for *S. J. Grey & Willcox*, Birmingham (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

E

BRITON FERRY STEEL CO., LTD. *v.* BARRY.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), **December 6, 7, 1939.**]

F *Income Tax—Trade—Succession to trade—Division of manufacture—One process carried on by subsidiary companies—Remaining process carried on by parent company—Sales effected by another subsidiary company—Merger of manufacturing companies but not of selling company—Finance Act*, 1926 (c. 22), *s.* 32 (2)—*Income Tax Act*, 1918 (*c.* 40), *Sched. D, Cases I & II, r.* 11 (2).

G The appellant company until 1934 was mainly concerned with the manufacture of steel bars, and the conversion of these bars into tinplate was carried out by 6 subsidiary companies. The whole share capital of these subsidiary companies was owned by the appellant company. Another subsidiary company carried through the sale of the plates manufactured by the subsidiary companies. In 1934, the subsidiary manufacturing companies were wound up, the whole of their under-
H takings being transferred to the appellant company, but the plates made by the appellant company were sold through the selling company as before. The appellant company was then assessed in respect of a new trade under Sched. D, Cases I and II, r. 11 (2). It was contended, on behalf of the appellant company, that it had not succeeded to a trade which could be identified, as the additional processes, after the merger, expanded the work of the appellant company:—

HELD: the appellant company had continued to carry on the trades formerly carried on by the subsidiary companies, and there was a succession to those trades.

Judgment of Macnaghten, J. ([1938] 4 All E. R. 429) *affirmed.*
Laycock v. *Freeman, Hardy & Willis, Ltd.* (1) *distinguished.*

[**EDITORIAL NOTE.** This case is distinguished from that of *Laycock* v. *Freeman, Hardy & Willis, Ltd.* (1) by reason of the fact that there a wholesale manufacturing business ceased, and the parent company, after the reconstruction, carried on a retail manufacturing business. In the present case, the selling company, although a subsidiary of the appellant company, has to be treated in law as a separate entity, and, therefore, the appellant company is not concerned with the selling of the manufactured article. It is therefore said that, after the reconstruction, the appellant company carried on, in addition to its former trade, the precise trade carried on by the six subsidiary companies.

As to Succession to a Business, see HALSBURY, Hailsham Edn., Vol. 17, pp. 111-113, para. 209; and for Cases, see DIGEST, Vol. 28, pp. 40-42, Nos. 208-214.]

Cases referred to:

(1) *Laycock* v. *Freeman, Hardy & Willis, Ltd.*, [1939] 2 K.B. 1; [1938] 4 All E.R. 609; Digest Supp.; 108 L.J.K.B. 270; 160 L.T. 41.

(2) *Bell* v. *National Provincial Bank of England*, [1904] 1 K.B. 149; 28 Digest 41, *211*; 73 L.J.K.B. 142; 90 L.T. 2; 5 Tax Cas. 1.

Appeal by the taxpayer from an order of Macnaghten, J., dated Nov. 4, 1938, and reported [1938] 4 All E.R. 429, where the facts are fully set out.

Cyril L. King, K.C., and *Frederick Grant* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

King, K.C.: The appellant company never succeeded at all to a trade which can be identified, since the additional processes, after the merger, merely expanded the work of the appellant company. The Crown's contention is that, before 1934, the profits derived from the separate trades were arrived at on the basis that there had been purchases and sales and that the profits of the subsidiary companies were profits derived from the making of tinplate. The continuation of that state of things is implicit in there being a succession. The suggestion of succession can only be maintained by supposing, contrary to the facts, that there had been purchases by the subsidiaries. There was nothing in the evidence to justify the commissioners in coming to the conclusion to which they came. After Apr. 7, 1934, there were no purchases by the subsidiary companies. They ceased. The underlying assumption of the case for the Crown is that there had been notional sales of material. In this respect, however, there is no real difference between the present case and that of *Laycock* v. *Freeman, Hardy & Willis, Ltd.* (1). The trade of each of the subsidiaries, in the present case, was the purchase of bars. After the merger, the trade cannot be found. The commissioners are wrong in law, in that they have failed to give effect to the decision in *Laycock* v. *Freeman, Hardy & Willis, Ltd.* (1). There was an existing trade, commencing with the purchase of steel bars. That particular trade ceased to exist.

Grant: One cannot arrive at the profits of the appellant company's old trade without assuming a notional sale of bars from the bar-making trade to the various tinplate trades. After the change, one trade only was being carried on. The trade of the subsidiaries was merged in the trade of the appellant company, and its trade is one trade. To say that A the appellant company, after the change, was carrying on the trade of making bars and also part of six other trades is an artificial conception, which there is no evidence to support. Although, as a result of the change, the appellant company has lost customers for bars, it has not lost any outlet for bars. The activities are the same, and the physical B destination of the product is the same. Notionally, those activities are split up into an old trade and part of six other trades. That is a completely artificial view, and is not a reasonable one. The reasonable view is that the trade of the appellant company is one trade which has been expanded. In *Bell* v. *National Provincial Bank of England* (2), the C court found that the trade acquired was carried on as a separate trade after the succession. In the present case, there was one trade only after the merger.

The Attorney-General: When a man acquires a new business with the intention of carrying it on, there is no reason why he should, in that D year, pay income tax as though he had not that additional source of income. The words of the rule apply whether or not the person who acquired the business was already carrying on a similar business. The application of the present method of computation must always involve the splitting up of the activities of what is really one business as though E that business were in fact two. In *Bell* v. *National Provincial Bank of England* (2), the profits were not separately ascertained. The present case is concluded in favour of the Crown by the finding of the commissioners. No difficulty arises from the decision in *Laycock* v. *Freeman, Hardy & Willis, Ltd.* (1) when the business to which succession is alleged F is acquired by the suppliers of the raw material to that business. All that it is necessary to find is that the business succeeded to was a separate business before its acquisition, and that it was carried on afterwards. The only point to consider is whether or not the business is still being carried on. If it is being carried on, succession is established.

G *King, K.C.*, in reply.

SIR WILFRID GREENE, M.R.: This appeal arises out of assessments to income tax made upon the appellants in respect of the years ending Apr. 5, 1935, and Apr. 5, 1936, respectively. The assessments were H made upon the basis that on Apr. 7, 1934, the appellants succeeded to the businesses previously carried on by 6 companies which were what is commonly called "wholly-owned" subsidiary companies of the appellants. Before Apr. 7, 1934, when the businesses of the subsidiaries were transferred to the appellants, the subsidiaries having been put into liquidation (which date, for convenience, I will call "the amalgamation date "), the business activities of the appellants consisted of making steel bars, which they sold in part to the subsidiaries and in part to outside purchasers, and part of their production they themselves used for the purpose of making what is known as blackplate in a factory of their own. Steel bars are produced by two processes—namely, (i) the smelting of pig iron or scrap iron and casting it into ingots, and (ii) the heating and the rolling of the ingots to turn them into steel bars. Those were the commodities which they sold to their subsidiaries. The business of the subsidiaries consisted in making from those steel bars tinplate which they sold. The further processes necessary for making the tinplate consist of cutting the bars, rolling them into thin sheets which are called blackplate, and then dipping the blackplate into a bath of molten tin and passing it through rollers, which turns it into tinplate. Those processes were the processes carried on by the subsidiary companies, and their profits were, of course, ascertained by reference to the price which they paid to the appellant company for the bars and the profits that they made out of selling the ultimate product, the tinplate. There is one thing that arises in the course of these operations—namely, scrap—with which I will not deal now, but I will mention later a particular argument that was founded upon it.

After the amalgamation date, what I may call the original activities of the appellant company underwent a change, because, as Clauson, L.J., put it in the course of the argument, they had lost 6 customers—namely, the 6 subsidiary companies—and the steel bars which previously they would have disposed of by sale to those companies they now no longer sold as steel bars at all. Those changes, therefore, have taken place as the result of the amalgamation in the business activities of the appellants. If one looks at the business activities of the subsidiary companies, and treats them for the moment as being held apart from the activities of the appellants after the amalgamation, the only difference in those activities is that, whereas the steel bars required for the production of the tinplate had previously been acquired by purchase from a separate entity—namely, the appellant company—they are now produced by the same entity as is producing the tinplate, and, so far as the tinplate part of the business is concerned (by which I mean the part concerned with the operation of turning steel bars into tinplate), the only difference which has occurred in that part is that the raw material of those activities now enters that branch of the business, not by reason of a purchase from an outside person, but by coming from the appellant company itself, and being used by itself in the tinplate business. Those are, in my view, the main and crucial facts which it is necessary to bear in mind in considering the problem raised by this appeal. The other details are to be found in the original stated case and in the supplement to the case.

In that state of affairs, the Crown took the view that the profits of the appellants for the two years in question fell to be dealt with in accordance with the provisions of the Finance Act, 1926, s. 32 (2). That section substitutes the rule there set out in the place of Sched. D, Cases I and II, r. 11. Rule 11 (2) deals with successions to businesses other than those specifically dealt with in r. 11 (1), which deals with the special case of partnerships, and it provides as follows :

> If at any time after the said Apr. 5 [1928] any person succeeds to any trade . . . which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade . . . at that time. . . .

The Crown claimed that, on the facts of this case, the appellants had on Apr. 7, 1934, succeeded to the trades theretofore carried on by the 6 subsidiary companies, and they claimed that, accordingly, in assessing the appellant company to income tax for the years in question, the appellant company must be treated as though it had set up the trades to which it had so succeeded on Apr. 7, 1934, and that the profits of the appellant company referable to those branches of their activities must be computed as the rule directs.

The matter came before the special commissioners, who held originally that the appellants had succeeded to those businesses, and they upheld the assessments, subject to certain agreed amendments of figures. The appellants appealed first to the King's Bench Division, and MACNAGHTEN, J., upheld the decision of the commissioners. From his decision an appeal was brought to this court, and, after the case had been opened, or while it was in the course of being opened, the court, as then constituted, took the view that, in view of *Laycock* v. *Freeman, Hardy & Willis, Ltd.* (1), a decision of this court which had not been made public, although I think it had been delivered at the time when the matter was before the commissioners—a decision which the commissioners had not got before them when they came to the decision to which they came—it was desirable that the matter should be referred back to the commissioners, in order that they might have an opportunity to reconsider their conclusions both of fact and of law in the light of the decision of this court in that case.

At this stage I think it is convenient to say a word or two of a general character with regard to the effect of the subrule in question. The subrule is expressed in language which is easily applicable to the simple case of a person who has not previously carried on a business acquiring a business from somebody who has carried it on and continuing to carry it on thereafter. Indisputably, however, the subrule is not limited to that simple class of matter. It extends to much more complicated transactions, of which the present is an example, and it involves, and necessarily involves, a large measure of artificiality in its application. It is obvious that, where somebody, be it an individual or a company, who is already carrying on a business, acquires a business from somebody else and continues to carry it on, difficult questions must arise, because, in the ordinary course of business, if the business acquired is carried on, it becomes, to a greater or less extent, merged in fact in the old business of the company. It may alter its character, and the reality of the matter is that, as from the date of such an acquisition, there is one business, and one business only—namely, the business of the person who is carrying it on. I disregard cases where the business acquired is of a totally different character from that previously carried A on. That is the fact of the matter—namely, that one company is carrying on one business. However, the subrule directs us to regard the position in a different light. We are not entitled, and the assessing authority is not entitled, to treat such a state of affairs as merely an expansion of the business of the acquiring company. The subrule directs B that the business acquired shall, for the particular purposes mentioned, be held, so to speak, apart from the activities of the acquiring company, and, for those purposes, regarded in a different light. Where the company carrying on a manufacturing business acquires the business of a company which carries on a retail business, or *vice versa*, it is obvious that the C artificiality of this conception is great. Nevertheless, so far as the subrule directs this artificial conception to be applied, we are bound to apply it. It is obvious that at one end of the scale there may be a case where there can be no doubt as to the continuing identity of the acquired business. At the other end of the scale, there may be a case D where it is impossible for a reasonable person to say as a matter of fact that the acquired business is being carried on any longer in any indentifiable form. Whether or not a particular case falls within either of these two types of case is, as I view it, a question of law. With regard to the area that lies between those two extremes, as I view it, it is a matter E of fact for the commissioners to say whether or not there is a succession within the meaning of the subrule and whether or not there are profits derived from the business to which the succession has taken place. That is one general observation with regard to the subrule.

There is another general observation which I think it desirable to make F in view of an argument put forward by the Attorney-General, which I shall have to mention later. The subrule does not suggest that the taxable fund upon which the taxpayer is ultimately assessed is anything but the real profits which he, as a taxpayer, has earned. It is not legitimate, in my view, to apply the subrule in such a way as to introduce some element G of notional profit, with the result of charging the taxpayer in respect of a profit which he has never realised. The object of the subrule is to ensure that, in cases where there is the transfer of a business, the person acquiring it shall be treated as having started a new business. If that principle had not been adopted, the result would have been, so to speak, H that the business would have been treated as the person to be taxed, and not the taxpayer himself, because the acquiring taxpayer would then have found himself charged, in the first year after he acquired the business, with tax measured by the profits earned by the business at the time when his predecessor owned it. That principle has not been adopted by the legislature, and instead the acquiring person is treated as having started a new business. In some cases, that may work to his advantage. In other cases, it may work to his disadvantage. That, however, is the principle.

The third point to which I wish to refer upon this subrule is that the A direction as to the manner in which tax is to be computed—namely, that it shall be computed as if the trade had been commenced at the relevant time—only operates, of course, so long as that basis of computation is a relevant matter, and the basis of computation based on the hypothesis that the trade is a new trade lasts for so long only as the B provisions of the Act in relation to the setting up of new trades persist. I say that because it was argued on behalf of the appellants that the effect of holding that, in the present case, there had been a succession would be that for ever afterwards the appellants must be treated, for income tax purposes, as carrying on, not one trade, but seven—namely, C the six trades of their subsidiaries and their own original trade. I cannot take that view. It seems to me quite clear, upon the construction of the subrule, that this artificial treatment of what, in this case at any rate, is in truth one business is to endure for the purposes of computation only so long as the setting up of a new business is a relevant matter, D and it ceases to be a relevant matter, I think I am right in saying, in the fourth year after the date of setting up.

Having made those general observations, I think that the next thing which it is convenient to do at this stage is to say a word or two about the decision in *Laycock* v. *Freeman, Hardy & Willis, Ltd.* (1), because it E is upon that decision that the argument of the appellants is mainly based. That was a case where a company carrying on a retail business had acquired the businesses of two subsidiaries of its own, which had manufactured the articles sold by the parent company in its retail shops and sold them wholesale to the parent company. After the acquisition F of those manufacturing wholesale businesses, the parent company continued to sell in its retail shops articles produced in the factories which it had acquired from the subsidiaries which it had absorbed. Physically, so to speak, the lay-out of these operations remained the same, but there was one vital change in the situation. The business of the G subsidiary companies, which the Crown alleged was the thing to which there had been a succession, had, as was found by the commissioners, been that of manufacturing wholesalers. That implied that their profits were earned, not by the mere act of manufacture, but by realising on sale wholesale the products which they had manufactured. After the H amalgamation, there was no longer in existence a manufacturing wholesale business at all. No profits were being realised by sales wholesale. That essential activity of the subsidiary companies had disappeared altogether, and it was an essential activity in making the profits which would be charged with tax. All that was left of the activity of the subsidiary companies was the actual manufacturing, a thing which by itself produces no profits. On that basis, this court held that, on the special facts of that case, there had been no succession.

There was one argument advanced in that case to which I must refer, because much play has been made with it by the appellants in the present case. It was the argument put forward by the Crown to the effect that there ought to be assumed, for the purposes of applying the subrule, a sale on wholesale terms from the factory to the retail side of the company's activities. That had a certain colour of plausibility in the fact that the company in its own departmental accounts had treated the matter as though there had been sales from the factory to the retail warehouse, and a subsequent retail sale in the shops. That, of course, as was pointed out, was a pure matter of convenience in accounting, and did not reflect any actual transactions at all. However, the use which counsel for the Crown endeavoured to make of it in argument was this. It was said: "It is not correct to treat the business of manufacturing wholesalers as having come to an end, because, although in fact there are no sales wholesale at all, there must be deemed to be sales wholesale as between the factory and the retail warehouse." In other words, the argument involved setting up an imaginary sale in order to produce what was an essential element, the existence of which was necessary before any identity between the business before amalgamation and the business after amalgamation could be established—namely, the making of sales wholesale. That was the object of the argument, and it was held by this court that it was not legitimate to introduce something so completely unreal and to invent a sale which never had, in fact, taken place, in order to keep alive, for the purposes of the subrule, a business which had, in fact, ceased to exist. In view of that case, this court, as I have said, sent the present case back to the commissioners, and it is from their finding that the present appeal originates.

The finding of the commissioners is to be found in para. 3 of the supplement to the case:

> . . . the appellant company did succeed to the trades of bar rolling and plating formerly carried on by each of the subsidiaries on Apr. 7, 1934, and has continued to carry on such trades.

That is their finding, and, in so far as it is a finding of fact, it could not be interfered with by this court unless this court came to the conclusion that there was no evidence upon which it could be based. The commissioners then go on to explain how it was that they came to that conclusion. They put to themselves a question formulated by me in my judgment in *Laycock* v. *Freeman, Hardy & Willis, Ltd.* (1), at p. 614:

> . . . whether or not it is true and fair to say that the business in respect of which the successor is said to be making profits is the business to which he succeeded.

The commissioners go on as follows:

> We do not think that the fact that a purchaser of a trade chooses to amalgamate that trade as a department with his own prevents a succession if in other respects

> the identity of the trade acquired is preserved. In the present case we find that the identity of the trades formerly carried on by the subsidiaries has been preserved. As we understand it, we see no necessity for imputing any notional profit or expense either to the steel works or to the plate works. The appellant company produces these steel bars, not for re-sale, but for the purpose of its plate department. The profits of the plate works of the appellant company is the actual profit on the sale of plate—namely, the difference between the actual sale price of plate and the A actual cost of producing plate through each process.

Subject to one comment which I shall have to make later, I cannot find anything to quarrel with in the method of approach to the question which the commissioners there set out. It seems to me that they have properly directed themselves, and have come to a conclusion to which B the evidence before them justified them in coming. It is said, however, that there was really no evidence upon which they could come to the conclusion to which they did come with regard to the succession to, and the carrying on of, these businesses. It was said that, in order to arrive at that conclusion, it was an essential element in the logical process C involved to assume at one stage a notional sale of the steel bars out of which the tinplate was ultimately made. It was said that the business of the subsidiary companies could not be said to have persisted in a form identifiable for the purposes of the subrule, because, it was said, the businesses of the subsidiary companies had consisted in buying steel D bars, subjecting them to the necessary processes, and thereby producing tinplate. It was said, therefore :

> There is no longer within the four corners of what was acquired any purchase of steel bars at all, and, that essential element in the businesses acquired having disappeared, it is impossible to say that those businesses any longer exist, even for the artificial purposes of the subrule, and the only method of getting these businesses E back into a state of existence is by assuming the continuance of the missing part of their operations—namely, purchase of the steel bars.

I must confess that, if that argument had been a tenable one, and if the result flowed from the premises, it would have been a very attractive one, because it would have meant that the subrule could only be applied F to the facts of the present case by assuming at the relevant stage a transaction which never in fact existed—namely, a purchase of steel bars. On that basis, it was attempted to say that the observations made in *Laycock* v. *Freeman, Hardy & Willis, Ltd.* (1) on the subject of notional sales applied equally to the present case. In my opinion, that argument G cannot be sustained. It is based on a proposition which I do not think is an accurate one—namely, that the businesses acquired consisted of buying steel bars and then processing them in order to produce the finished article. In my opinion, that is a misleading description of the business. The way in which the business of the subsidiary companies H was being carried on was, no doubt, by purchasing the half-finished material, which was the raw material of their own businesses. There would have been no difference in their business in any relevant sense if, instead of buying their steel bars, they had decided to start making them for themselves. It would merely have been a change in the method of providing themselves with the raw material out of which they manufactured the tinplates. On the facts of the present case, the steel bars are, of course, made by the appellant company, which is now the same company which turns them into plates. I myself see no difficulty in obeying the directions of the subrule without introducing at any stage any notional sale. The business with which the subrule is concerned is the business carried on by the predecessor. If one examines the facts of the present case, one finds that the appellants, who are the alleged successors, are doing every single thing which the subsidiary companies had previously done, from the steel-bar stage, and, from the point when the steel bar enters the tinplate branch of the business, the operations which take place are precisely the same, and the profits are ultimately made by the sale of the finished product. The only difference lies in the fact that the steel bar gets into the tinplate department, not by a purchase from an outside body, but by a delivery from a different department of the appellants' works—namely, the department which makes steel bars.

If the provisions of the section are to be carried out, and if the continued existence and identity of the businesses exist, what is the way in which the whole matter works out ? Here it is important to bear in mind what I said earlier—namely, that the rule does not have the result of taxing profits which have never in fact been realised. The problem, therefore, is to arrive at the taxpayer's profit in accordance with the section, and anything in the shape of a notional sale must be rejected, if that would involve ascribing to the taxpayer a profit which he has never earned. If a notional sale is to be assumed, it would work in that way. The problem being to ascertain the taxable profits of this taxpayer, a certain part of his profits falls to be dealt with in the artificial way provided by the subrule, and the rest of his profits falls to be dealt with in the ordinary way. If we are to say that the matter must be treated as though the appellant company had sold to the tinplate part of its business the steel bars which it makes in the steel-bar part of its business at a profit, the result in practice would be that the part of the profits referable to the businesses acquired would be ascertained on the footing that those parts of the business had acquired their raw material at a particular price, which in fact, of course, they had not. With regard to the rest of the profits of the appellant company, they would fall to be treated as though the appellant company had sold at a profit products—namely, their steel bars—to their own tin plate departments, which, of course, they had not, and, if that were the basis upon which the thing worked, the result would be to bring into charge to tax profits which had not been earned at all.

The solution, in my judgment, is along different lines. It seems to me that the businesses acquired may properly, for the purposes of the subrule, be treated, and should be treated, as beginning at the steel-bar stage—namely, the stage when those branches of the business procure for themselves a steel bar. Obviously, in order to arrive at profits of

those branches of the business on that basis, some figure must be brought
into account to represent the cost of the steel bar. If that figure is based
on an imaginary sale price at a profit, it is an unreal figure. If, on the
other hand, it is brought in at the actual cost of producing that steel
bar, it is a real figure, and, if we treat—as we are bound by the rule to do
A —the two parts of what is in truth one business as though they were held
apart, the only way in which, in my judgment, that direction can logically
be carried out is the way that I have indicated of bringing in the raw
material—namely, the steel bar—at the actual cost of production. If
that is done, it fits in exactly with the fact that, by reason of the amal-
B gamation, the appellant company has lost 6 customers, because, whereas
it had previously been manufacturing with a view to selling to 6 customers,
it is now manufacturing with a view to passing on to its tinplate
department, without any profit to itself, something which it has manu-
factured in the other part of its concern.

C It seems to me that that solution of the difficulty is the proper solution.
It is in accordance with the language of the subrule, and it involves no
assumption of a notional sale. However, it does involve ascertaining
the cost of making the steel bars for these various acquired businesses.
With regard to that, there appears to me to be no difficulty whatsoever
D in principle. There may be very serious difficulties in ascertaining the
proper figure but those are matters with which accountants are familiar,
and with which they have to deal every day. Something was said about
that class of operation in my judgment in *Laycock* v. *Freeman, Hardy &
Willis, Ltd.* (1). The accountant's task would be to ascertain by proper
E methods and proper apportionment what the cost of production of the
bars was, including, of course, overheads, and all other things which
have to be apportioned. The effect of that operation is not to invent
some artificial or unreal process, such as a sale, but to ascertain what is
a reality—namely, the cost of producing a particular article—wrapped
F up though that reality may be in a number of difficult problems of
accountancy. Nevertheless, the figure at cost of the article down to
that stage is a real figure, and can be ascertained. There is nothing
notional, imaginary or fictitious about it.

There is another way of arriving at precisely the same result, and it
G is this. It may be said that the appellant company should be regarded
as carrying on the businesses acquired, but as having modified them or
altered them by substituting for a purchase of the raw material a manu-
facture of it for themselves. That, as I have said, leads to precisely
the same result. Speaking for myself, I prefer the other method of
H arriving at the result, for the reason that this latter method is one which
involves the consideration of a problem of fact of a rather different
character, because it is necessary to treat the business carried on after
the amalgamation as a business of producing steel bars and turning them
into tinplate. Such a business is arrived at at the expense, so to speak,
of the original business of the company, which, on that basis, must be

treated as having given up *pro tanto* that particular branch of its activities. It seems to me that whether or not, in a given case, the commissioners would come to a conclusion of fact on the identity of the business might present more difficult problems in future cases on that way of looking at it than if the matter be approached in the way that I first indicated—namely, by treating the original business as continuing, but as not making profit out of those steel bars which it passes on to the branches which represent the businesses acquired.

The Attorney-General suggested, but did not really strenuously argue, that the proper method was to ascertain the profits on the basis of a notional sale. When the matter was discussed in the course of argument, he did not wish to press that argument, and I think that the reasons why, in my judgment, it is not sustainable sufficiently appear from what I have already said.

There is only one further matter to which I need refer, and that is the question of scrap. That arises in this way. Before the amalgamation, the subsidiary companies used to sell back to the appellant company the scrap which came into existence in the process of cutting and rolling out the steel bars into blackplate. The subsidiary companies sold that scrap back. It was used by the appellant company in the same way as the other scrap that it bought. In other words, the scrap went back into the mill and emerged finally in the form of other steel bars. As the result of the amalgamation, the businesses acquired no longer conduct the activity of selling scrap. That particular activity has come to an end. The effect of that happening, however, is not one which must necessarily have the result of forcing the commissioners to say that the business of the subsidiary companies has come to an end. The sale of that scrap was a subsidiary part of those businesses, and the fact that it is no longer done cannot, in my judgment, affect the question as to whether or not there is a succession. Another argument raised in connection with the scrap is that, whatever be the case with regard to the other inter-departmental transactions, in the case of the scrap one must assume a notional sale. Otherwise one never can arrive at any proper result in figures at all. I listened carefully to that argument, and I hope that I understood it, but I am afraid that I cannot accept it. It seems to me that the position of the scrap is perfectly simple, and falls into line exactly with what I have already said on the main matters in the case. Since the amalgamation, the tinplate branches of the appellants' business produce, each of them, in the course of their operations, what may be called a by-product—namely, scrap. That scrap is something which has a value. Previously the subsidiary companies sold it. Now it is not sold. Nevertheless, it is a valuable thing produced in the course of their operations. What in fact happens to it is that, together with the scrap produced by the other branches, representing businesses which have been acquired and other raw material bought outside by the appellant company, it goes back, so to speak, into a common pot, and out of that common pot further steel bars are produced which find their way to the tinplate branches of the business. The proper method of dealing with that scrap so produced, in the light of those facts, appears to me to be quite a simple matter, and it seems to me a perfectly simple matter to ascertain, on the basis which the subrule directs, the profits of these acquired businesses without introducing any element of notional sale of scrap at all. In other words, the existence of that scrap has the result of reducing the cost of producing the next lot of steel bars, and that reduction of cost would be reflected in the cost price of the next lot of steel bars. I see no difficulty in the matter at all.

The only thing which remains for me to say is this. I have indicated what, in my opinion, is the strict method of applying this section to a case like the present, which does not involve any notional sale at all, or any notional profit realised inter-departmentally. It is right to say, however, that I understand that, in the present case, the figures have been agreed on the basis that the profits of these businesses taken over are, for the purposes of the subrule, to be ascertained as a matter of figures on the basis of the inter-departmental sales, which, for their own convenience, the appellants treat in their accounts as having taken place. In many cases, it may be very convenient, both for the Crown and for the taxpayer, to adopt some such rough-and-ready method as that for arriving at the result, and nothing that I say must be taken as in any way precluding the parties from arriving at an agreed result without going through what may, in many cases, be an expensive and difficult process raising, perhaps, matters of controversy—namely, of ascertaining the sum which should be treated as being the cost of the steel bar, as it is in this case, or whatever else it may be in other cases. Sensible people will, no doubt, endeavour to avoid unnecessary expense if, by so doing, they can reach a satisfactory and just result. It was essential, for the purposes of this judgment, to ascertain the true and proper course under the subrule, because that is a necessary step in the whole process of reasoning which must be gone through in order to appreciate the proper application of the subrule to facts such as these. In the result, the appeal fails, and must be dismissed with costs.

Scott, L.J.: I agree.

Clauson, L.J.: I agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Ingledew, Sons & Brown*, agents for *Crawfords*, Swansea (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re CAPON, TRUSTEE IN BANKRUPTCY *v.* KNIGHT (R.C.) & SONS.
SAME *v.* WOODWARD & WOODWARD.

[Chancery Division (Farwell and Morton, JJ.), **October 30, November 20, 1939.]**

Sale of Goods—Transfer of property—Ascertained goods—Purchase price provided by auctioneers—Bankruptcy of purchaser—Whether property in goods in purchaser or auctioneers—Sale of Goods Act, 1893 (c. 71), *s.* 17 (1).

Both the respondents were auctioneers, and from time to time each of them had advanced money to a farmer whereby the latter was enabled to acquire pigs at their respective auctions. In each case, the farmer, before removing the pigs to his farm, signed notes acknowledging that the pigs were the property of the respondents and that they could be removed and sold by them at any time. In the usual course of business, such pigs were later resold by the auctioneers, the farmer receiving the profit on the whole transaction less auctioneer's commission. On Feb. 23, 1938, the farmer executed a deed of assignment and in March, 1938, was made bankrupt. On Feb. 23, 1938, the respondents entered the farm, seized the pigs and re-sold them. The appellant, the farmer's trustee in bankruptcy, claimed the proceeds of sale of the pigs, on the ground that the arrangements made between the respondents and the debtor were ineffectual attempts to obtain security for the money advanced to the debtor, while the respondents contended that the debtor had bought the pigs as their agent, and that at all material times the pigs were their property :—

Held : the property in the pigs had passed from the vendor to the debtor and the subsequent seizure and sale of the pigs by the respondents were wrongful. The trustee in bankruptcy was, therefore, entitled to the proceeds of sale of the pigs seized.

[EDITORIAL NOTE. The Sale of Goods Act, 1893, s. 17 (1), provides that, on a sale, the property is transferred to the buyer at such time as the parties intend. That refers to the parties to the contract of sale, and, if there is an ascertained buyer, an auctioneer would not be a party to the contract. Upon this ground, it is held that the pigs passed to the farmer, and not to the auctioneer. This, in its turn, in the present case depends upon a finding of fact that the farmer was not an agent of the auctioneers when bidding at the auction.

As to Transfer of Property in Specific Goods, see HALSBURY, Hailsham Edn., Vol. 29, pp. 83, 84, paras. 97-99 ; and for Cases, see DIGEST, Vol. 39, pp. 501, 502, Nos. 1187-1205.]

Appeal by the trustee in bankruptcy against the decision of His Honour Judge Hildesley, K.C., given at the Ipswich County Court on July 5, 1939, whereby it was ordered that the appellant's motions be dismissed and the costs paid by the appellant. In two motions, the trustee in bankruptcy had asked for an order on the respondents, who were both firms of auctioneers, to pay him £4,408 2*s.* 3*d.*, being the proceeds of sale of certain pigs. In the first, R. C. Knight and Sons were the respondents and, in the second, Woodward and Woodward. By order of the county court dated Apr. 5, 1939, these two motions were consolidated, and both in the county court and in this appeal were dealt with together. The proceedings in the county court are reported [1939] L.J.N.C.C.R. 275. The facts are fully set out in the judgment of the court.

Charles E. Harman, K.C., and *C. L. Henderson* for the appellant.

J. B. Blagden for the respondents.

FARWELL, J. [delivering the judgment of the court]: The debtor is a farmer, and down to 1938 carried on business at Kenton Hall and elsewhere in the county of Suffolk. According to his evidence, he began farming on his own account in or about 1906 and continued to carry on that business down to 1918. In 1922, he began farming again, but in 1927 he executed a deed of assignment for the benefit of his creditors. At that time, his liabilities were estimated at £67,000. By an arrangement between the larger creditors, 15*s.* in the £ was paid to the smaller creditors. In 1934, he began business as a pig-farmer, but on Feb. 24, 1938, he again executed a deed of assignment for the benefit of his creditors. On Mar. 14, 1938, a receiving order was made against him, and on Mar. 18, 1938, he was adjudicated bankrupt, and the appellant was appointed trustee in his bankruptcy.

The appellant seeks from this court an order on the respondents to pay to him £4,408 2*s.* 3*d.*, being the proceeds of sale of certain pigs, and an order for the costs of the proceedings here and in the court below. Between 1934 and 1938, the debtor from time to time acquired various lots of pigs at auction sales held by the respondents respectively, both of whom carry on business as auctioneers in Suffolk. The pigs so acquired by the debtor were taken by him to his farm and there fattened and subsequently sold. Immediately before the execution of the deed of assignment of 1938, the debtor had at his farm some 600 odd pigs. The respondents, acting together without the debtor's consent, entered on his farm on Feb. 23, 1938, and removed some of the pigs. On the following day, they again entered forcibly on his farm and removed the remainder of the pigs. They subsequently sold all the pigs, and it is the proceeds of sale of those pigs which the appellant now claims as assets in the bankruptcy. That claim was rejected by the county court judge, and this is an appeal from that rejection.

It appears from the evidence that between 1934 and 1938 the debtor was not in a position to pay for the pigs which he bought, and that these transactions were carried out under the following arrangements made between himself and the respondents respectively. The debtor from time to time attended auction sales held by one or other of the respondents, selected the pigs which he desired to buy, and bid for them. If they were knocked down to him, he received a bought note in the usual form, stating the lots bought, their price, and the amount due. The auctioneer in every case himself provided the purchase price. The pigs were taken by the debtor to his farm and there fattened and then resold, and out of the proceeds of sale the auctioneers were repaid the moneys which they had advanced. The resales were for the most part

at auctions held by the respondents, at whose auctions the pigs had originally been bought, in which the auctioneer credited himself with the usual auctioneer's commission. If, however, the pigs were sold elsewhere, the debtor paid to the auctioneer 5 per cent. on the purchase price in lieu of commission. In each case, before the pigs were removed by the debtor from the auction, he signed a note addressed to the A
auctioneer in which he acknowledged the receipt of the pigs, and that note contained a statement by the debtor that the pigs were the auctioneer's property, and could be removed and sold by him at any time.

On the occasion of the first transaction with the respondent Woodward, a letter, dated Dec. 18, 1934, was written by Gordon Woodward, a B
member of the respondent firm, to the debtor and answered by him on Dec. 21. Those letters contain what has been called an agistment agreement. No such letters passed between the debtor and the respondent Knight, although apparently a similar arrangement was made between the debtor and this respondent. The appellant contends C
that the arrangement made between the respondents and the debtor was an ineffectual attempt by the respondents to obtain some security for the money which they had advanced to the debtor, that the pigs never became the respondents' property, but remained at all times the debtor's property, that subsequently the seizure and sale of the pigs by the D
respondents were wrongful, and that the respondents are bound to account to the appellant for the proceeds of sale. On the other hand, the respondents contend that at all the auctions at which the debtor bought pigs he was acting as the agent of the auctioneers, and that the pigs were at all material times their property, and were placed by them on E
the debtor's farm under agistment agreements, that they were accordingly entitled at any time to remove and sell the pigs, and that the proceeds of sale of the pigs seized and sold by them were and are their property. The county court judge accepted the respondents' contention. and we have to determine the correctness of that decision. It is not F
open to this court to review the facts as found by the county court judge, but, so far as his decision rests on inference to be drawn from the facts and documents in the case, it is open to this court to draw inferences other than those drawn by him. In the present case, as we understand it, the judge's decision rests wholly on the inference which he thought G
should be drawn from the facts and documents, and it is, therefore, open to us to review it.

In our judgment, the county court judge's decision is erroneous. The arrangements between the debtor and the respondents were in each case for all practical purposes the same, although the language of the docu- H
ments differs somewhat, and they were treated by the judge as being on the same footing in all respects. He appears to have taken the view that, when the debtor bid for pigs at various sales, he did so as agent for the auctioneers in each case, and that, when the pigs were knocked down to him, the property in them passed to the auctioneers, and not to the

debtor. The judge referred to the Sale of Goods Act, 1893, s. 17 (1), which provides that the property shall be transferred at such time as the parties to the contract intend it to be transferred, and he then said that the evidence taken as a whole negatived an intention to transfer the property to the debtor. In our judgment, this is a misconception of the meaning of that section. The contract there referred to is the contract for sale between the vendor and the purchaser. In the present case, it has never been suggested by anyone that the original vendor knew anything whatever of any arrangement between the debtor and the auctioneers. The only parties to the contract, so far as the vendor was concerned, were the vendor himself and the debtor. The vendor clearly intended that the property in the goods, when sold, should pass to the debtor, and, as between them, there can, in our judgment, be no doubt but that, as the result of the auction sales, the property in the goods passed to the debtor. If he was in fact the agent of the auctioneers, he may have acquired the property as trustee for them, but, as between himself and the vendor, the property in the pigs passed to him. As we understand the county court judge's judgment, his decision is based on what is, in our view, a misconception of the effect of the Sale of Goods Act, because he considered that the result of the arrangements made between the debtor and the auctioneers was that the property in the pigs passed to the auctioneers and remained in them so that the pigs were their property and they were entitled to deal with them as they thought fit. If, however, the true view be that the property in the pigs passed to the debtor, and was never in the auctioneers, then the whole basis of the decision goes. In our judgment, the result of the auction sales was that the property in the pigs passed to the debtor, and, whatever may have been the result of the arrangements between the debtor and the auctioneers, those arrangements never operated to pass the property in the goods to the auctioneers. They are extremely equivocal, and open to more than one interpretation, but, in our judgment, the arrangements did not constitute the debtor the auctioneers' agent, but were intended to give the auctioneers some charge on the pigs to secure the moneys which they advanced from time to time. Any such charge, not being registered as a bill of sale, is admittedly invalid as against the appellant, and consequently, in our judgment, the pigs on the farm on Feb. 23, 1938, and Feb. 24, 1938, were the property of the debtor, and became part of his assets in the bankruptcy, with the result that the respondents were not entitled to seize or sell them, and they must accordingly account to the appellant for the proceeds of sale.

Appeal allowed. Respondents to pay appellant the proceeds of sale of the pigs, with costs in both courts. Leave to appeal to the Court of Appeal.

Solicitors: *Herbert Smith*, agent for *Westhorp, Cobbold & Ward*, Ipswich (for the appellant); *Field, Roscoe & Co.*, agents for *Gotelee & Goldsmith*, Ipswich (for the respondents).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

DOVER NAVIGATION CO., LTD. *v.* CRAIG.

[House of Lords (Viscount Maugham, Lord Atkin, Lord Russell of Killowen and Lord Wright), **November 8, 9, December 13, 1939.]**

Workmen's Compensation—Sailor—Ship sent to mosquito-infested area—Death from yellow fever and/or malaria—Dangerous locality—Whether death due to injury arising out of his employment—Workmen's Compensation A *Act,* 1925 (*c.* 84), *s.* 1 (1).

The deceased had been employed as a sailor on a ship which was sent to a mosquito-infested river in West Africa. It was found that his death was due to yellow fever and/or malaria caused by mosquito bites. It was contended for the employers that the death was due to a natural cause, and that this was a risk equally shared by everybody in the B locality :—

Held : the fact that the deceased was especially exposed by reason of his employment to the risk of yellow fever was evidence of a sufficient causal relation to show that he contracted the fatal illness in the course of his employment.

Order of Court of Appeal ([1938] 4 All E. R. 559) *affirmed.*

Karemaker v. *Corsican* (*Owners*) (4) *overruled.* C

[EDITORIAL NOTE. Where, by the conditions of his employment, the workman is brought into contact with a special danger, it must be shown that he had to encounter that danger as a risk incidental to his employment. Where the danger arises from natural causes, it must be shown that the character of the employment created or intensified the risks that arose from those natural causes, so as to expose D the workman to some peculiar or extraordinary danger. Where the risk is peculiar to a particular locality, it has to be shown that the employment brought the workman to that locality, and it is here held to be shown that the employment of the workman brought him to a place where he might contract the disease as a result of which he died, and, therefore, his death is due to injury arising out of his employment.

As to Risks Incidental to Employment, see HALSBURY, 1st Edn., Vol. 20, E Master and Servant, pp. 168, 169, para. 358 ; and for Cases, see DIGEST, Vol. 34, pp. 318-323, Nos. 2604-2641. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 85-94.]

Cases referred to :

(1) *Thom* (*or Simpson*) v. *Sinclair*, [1917] A.C. 127 ; 34 Digest 320, *2619* ; F 86 L.J.P.C. 102 ; 116 L.T. 609 ; 10 B.W.C.C. 220.

(2) *Dennis* v. *White* (*A. J.*) *& Co.*, [1917] A.C. 479 ; 34 Digest 321, *2627* ; 86 L.J.K.B. 1074 ; 116 L.T. 774 ; 10 B.W.C.C. 280 ; *revsg.*, [1916] 2 K.B. 1.

(3) *Brooker* v. *Borthwick* (*Thomas*) *& Sons* (*Australasia*), *Ltd.*, [1933] A.C. 669 ; Digest Supp. ; 102 L.J.P.C. 170 ; 149 L.T. 590 ; 26 B.W.C.C. 495.

(4) *Karemaker* v. *Corsican* (*Owners*) (1911), 4 B.W.C.C. 295 ; 34 Digest 319, G *2609*.

(5) *Warner* v. *Couchman*, [1912] A.C. 35 ; 34 Digest 318, *2604* ; 81 L.J.K.B. 45 ; 105 L.T. 676 ; 5 B.W.C.C. 177 ; *affg.*, [1911] 1 K.B. 351.

(6) *Upton* v. *Great Central Ry. Co.*, [1924] A.C. 302 ; 34 Digest 276, *2336* ; 93 L.J.K.B. 224 ; 130 L.T. 577 ; 16 B.W.C.C. 269.

(7) *Millar* v. *Refuge Assurance Co., Ltd.*, [1912] S.C. 37 ; 34 Digest 319, case *r*. H

(8) *Lawrence* v. *Matthews* (*George*) (*1924*), *Ltd.*, [1929] 1 K.B. 1 ; Digest Supp. ; 97 L.J.K.B. 758 ; 140 L.T. 25 ; 21 B.W.C.C. 345.

Appeal by the employers from an order of the Court of Appeal (Slesser, Clauson and Goddard, L.JJ.), dated Nov. 28, 1938, and reported [1938] 4 All E.R. 559, allowing an appeal from an award made by His Honour Judge

Richardson on May 6, 1938, in the South Shields County Court (reported [1938] L.J.N.C.C.R. 183), wholly setting aside the award, and ordering that an award be made in favour of the respondent for the sum of £180 as workmen's compensation with costs. The facts and the arguments are fully set out in the opinions of their Lordships.

D. P. Maxwell Fyfe, K.C., *J. Harvey Robson* and *John Bassett* (for *Harvie Watt* on war service) for the appellants.

F. A. Sellers, K.C., and *Paul Tyrie* (for *Alexander Ross* on war service) for the respondent.

Viscount Maugham [read by Lord Thankerton]: My Lords, I do not propose in the present case to embark on the dangerous task of endeavouring to lay down any general principle which will help to solve future problems arising out of the Workmen's Compensation Act, 1925. I am content to take the facts as stated in the opinion of my noble and learned friend Lord Atkin, and to state as shortly as I can why, in those circumstances, I agree with the judgments of the Court of Appeal, and therefore feel compelled to differ from the decision of the county court judge at South Shields.

The question is whether the death from yellow fever in the circumstances detailed by my noble and learned friend Lord Atkin was an accident arising out of and in the course of the employment of the deceased as a seaman serving on board the Sea Rambler. Clearly the death occurred in the course of his employment. Did it also arise out of it? The authorities show, if authorities are needed on that point, that the words connote a certain degree of causal relation between the accident and the employment. It is impossible exactly to define in positive terms the degree of that causal connection, but certain negative propositions may, I think, be laid down. For example, we are bound, I think, to hold that the fact that the risk is common to all mankind does not prove that the accident does not arise out of the employment: *Thom (or Simpson)* v. *Sinclair*, (1) and *Dennis* v. *White (A. J.) & Co.* (2). Nor can it be held that death or injury from the forces of nature, e.g., earthquake and lightning, is not, merely because the accident is due to the forces of nature, an accident arising out of the employment: *Brooker* v. *Borthwick (Thomas) & Sons (Australasia), Ltd.* (3), and cases there cited. In these cases, however, it is laid down that, as was said by Lord Atkin in delivering the judgment of the Privy Council in *Brooker's* case (3), at p. 676:

> . . . it has to be shown that the workman was especially exposed by reason of his employment to the incidence of such a force.

In my opinion, there is no doubt as to the correctness of that principle, and we are bound by it.

My Lords, it is clearly impossible to hold that all illnesses or diseases contracted by a workman in the course of his employment are accidents arising out of his employment. Even if the proposition were limited to cases in which modern science has discovered that the illness or disease is due to pathogenic bacteria, whether borne by air, water, animals such as rats, or insects such as lice or mosquitoes, I think that the general proposition cannot be supported. If it can be shown, however, that the workman was especially exposed, by reason of his employment, to the risk of the infection by disease-bearing bacteria, I see no difficulty in coming to the conclusion that illness or disease so caused is due to an accident arising out of his employment. This is no more than an application of the principle stated in *Brooker's* case (3) to cases where pathogenic bacteria operate in a sense as forces of nature. In my opinion, there is no distinction between the extent and the nature of the causal relation in the one case and in the other.

My Lords, this view is sufficient for the decision on this appeal. *Res ipsa loquitur.* The facts themselves establish the terrible nature of the risk to which the ship's company in this case was exposed by reason of the ship's visits to Zighinchor and Dakar Roads on the West Coast of Africa in July and August, 1936. Thirteen members out of a crew of 24 contracted yellow fever, and 7 died. It is impossible to doubt that the Sea Rambler was one of the most dangerous places in the world at the time when the officers and crew were exposed to the risk of being bitten by day-flying mosquitoes which had themselves bitten human beings suffering from yellow fever.

My Lords, I share the doubts which some of your Lordships will express as to whether *Karemaker* v. *Corsican* (*Owners*) (4) was correctly decided, but I do not mean to hold that all illnesses due to extremes of heat and cold in various parts of the globe are accidents arising out of the employment. I express no opinion one way or the other on that question.

I ought to add one remark. In the case now before us, it is, I think, an irrelevant circumstance that the risk in question was a danger to which all other persons in the same area were also subjected. For me, it is sufficient that the unfortunate man Craig was especially exposed by reason of his employment to the risk of yellow fever. That is, I think, evidence of a sufficient causal relation to show that he contracted the fatal illness in the course of his employment, and it is not *ad rem* to show that other persons, voluntarily or otherwise, ran the same risk. For these reasons, I agree with the conclusion of the Court of Appeal, and, accordingly, this appeal should be dismissed with costs.

Lord Atkin: My Lords, this is an appeal from the Court of Appeal, who reversed the decision of the county court judge at South Shields, who, in an application by the respondent under the Workmen's Compensation Acts, made an award in favour of the employers, the present appellants. The applicant claimed as a dependant of her son John Charlton Craig, deceased, who she alleged died as the result of an injury by accident arising out of and in the course of his employment. Craig was employed by the appellants as an able-bodied seaman on their steamship the Sea Rambler. In the course of June and July, 1936, the ship made two visits to ports round about Dakar, Senegal. With the first we do not now appear to be concerned. She left Dakar for Gibraltar, proceeded to the south of France, returned to Gibraltar, and thence made the voyage in connection with which this claim arises. She reached Dakar, thence went to Kaolakh, and thence to Zighinchor. She then returned to Dakar Roads, and stranded for a few hours at the mouth of the river. When refloated, she left for Gibraltar on Aug. 5. On Aug. 14, a series of illnesses began. On Aug. 14, one member of the crew, on Aug. 15 another, and on Aug. 17 four others, went down with high temperatures. The captain was naturally alarmed, and altered his course for Funchal, Madeira. The ship arrived there on Aug. 18. On Aug. 19, three more members of the crew became ill, and, on Aug. 20, two more, including the captain. On that date, the man whose symptoms had become known on Aug. 14 died. The next day, the chief steward died on board ship. Between Aug. 20 and Aug. 26, 11 members of the crew were taken to hospital, of whom 5, including Craig, died, and 6 recovered. The crew numbered about 24. The judge found that Craig died of yellow fever, probably accompanied by malaria, and that the illness was caused by the bites of mosquitoes, which were prevalent in large quantities, especially at Zighinchor. He rightly held such an illness to be an injury resulting from accident, and to have been suffered in the course of Craig's employment. He felt constrained by authority, however, to hold that the injury did not arise out of the employment, on the ground that Craig was not more exposed to the risk of mosquito bite than were all other people who frequent this part of the West African coast in summer. He particularly relied on the decision of the Court of Appeal in *Karemaker* v. *Corsican* (*Owners*) (4).

This decision was reversed by the Court of Appeal, SLESSER, CLAUSON and GODDARD, L.JJ. The judgment of SLESSER, L.J., who delivered the leading judgment, so entirely accords with my own views that I find it unnecessary to deal with the matter at length. In my opinion, this particular risk of injury by accident was inherent in the nature of the employment, and it was necessarily incidental to the performance of the sailors' work—phrases which are to be found in the opinion of LORD FINLAY, L.C., in *Dennis* v. *White* (*A. J.*) *& Co.* (2). I do not think that the case can be distinguished from the street-risk cases, of which that just cited is the leading case. As in those cases, here it seems irrelevant that other persons are exposed to the same risk. As was said by LORD PARMOOR in *Thom* (*or Simpson*) v. *Sinclair* (1), at p. 145, cited by LORD FINLAY, L.C., in *Dennis* v. *White* (*A. J.*) *& Co.* (2), at p. 482:

> The fact that the risk may be common to all mankind does not disentitle a workman to compensation if in the particular case it arises out of the employment.

For my part, I find it difficult to conceive a risk more truly arising out of the employment than the risk incurred by the seaman who is sent to work in a fever-infested place abroad. Once establish that the risk is one of "accident" and the connection between the employment and the accident seems to be clearly established. It seems as irrelevant that all other residents in the locality are subject to the same risk of accident as it is that all persons using the street are subject to the same risk as the servant employed to work in the street. In this particular A case, however, the servant would never be exposed to the common risks of the locality but for his employment. Unemployed, the seaman would not meet the particular risk at all. I myself am inclined to think that common risk of natural forces must mean the operation of the natural forces in the degree and to the extent that they would operate in the area B in which the workman could be said to be exposed to them unemployed. A seaman may be directed to serve in places abroad where the forces of nature, heat, cold, flood and tempest, cause much greater risk of injury than they do at home. In such cases, I personally doubt whether the fact that persons ordinarily to be found in the locality are exposed to C such risks is of any importance. They are exposed to the risk as residents in the area. He is exposed to the risk because he is required by his employment so to expose himself.

I cannot but think that a seaman ordered to serve within the Arctic Circle is exposed to the risk of cold by reason of his employment, and D that it is irrelevant that Eskimos or Laplanders are ordinarily subject to such risks. In particular, I wish to say that in my opinion *Karemaker* v. *Corsican* (*Owners*) (4), which the arbitrator felt bound to follow, was wrongly decided. I think it was wrong to consider only whether the risk of frostbite was usual to residents of Halifax, Nova Scotia, in E December. The judge should have considered whether the seaman was exposed to that risk by reason only of his employment. In any case, seeing that the injury was brought about by handling frozen rigging, the association with the employment seems to have been established conclusively. It seems difficult to distinguish between an injury to a deckhand F caused by handling frozen rigging and an injury to a fireman caused by handling hot firebars. It was interesting to hear, on the relation of counsel, that the experienced county court judge who decided that case at Liverpool later declined to follow it, treating it as a mistaken finding of fact. So far, I have followed the argument of counsel in treating the G accident as resulting from the "forces of nature." I doubt whether mosquito bites could properly be classified as instances of the exercise of the forces of nature any more than snake bites, or lion bites, or shark bites. They may, however, in the appropriate area, possibly be said to form one of the common risks to which the public is exposed, whether H employed or unemployed, and, if in such an area a Workmen's Compensation Act in similar terms to our own applied, the local tribunal might have to apply its mind to questions arising from such accidents. The present case merely decides that, where a seaman is sent to such an area and exposed to such risks in the course of his employment, the injury is the result of an accident arising out of his employment. I should like to add that the sentence from the judgment of the Privy Council in *Brooker* v. *Borthwick* (*Thomas*) *& Sons* (*Australasia*), *Ltd.* (3), at p. 675, beginning, " In the case of such a ' community risk ' as it was labelled," cited by the arbitrator, does not purport to convey the reasoning of the Board, but merely forms part of the statement of the argument of counsel, which the judgment proceeds to discuss. Taken by itself, as printed at the beginning of a paragraph, I can see that it might mislead, though, when the context is considered, I cannot think that the meaning is doubtful. For the reasons given above, I am of opinion that this appeal should be dismissed.

LORD RUSSELL OF KILLOWEN: My Lords, I concur, and I do not desire to add anything, except that I share the opinion that the *Karemaker* case (4) was wrongly decided.

LORD WRIGHT: My Lords, this appeal raises the constantly recurring problem under the Workmen's Compensation Act, 1925, s. 1, of whether an injury by accident which arose in the course of the man's employment also fulfilled the further condition that it arose out of his employment. The facts as found by the county court judge are simple, and can be shortly stated. The deceased man was a seaman, and the steamer on which he was employed sailed to the West Coast of Africa, and called at places where yellow-fever mosquitoes were numerous, and where there was a serious danger of an infectious mosquito bite. In fact, the deceased man, along with six other members of the crew, died of yellow fever, caused by poisonous mosquito bites incurred while the vessel was on the West Coast. It was not contested that the mosquito bites and consequent death constituted an injury by accident.

It has been established by various decisions of this House that the Workmen's Compensation Act is a remedial measure, intended to give rights beyond those the common law gives, and that it is a practical measure expressed in non-technical language, to be construed according to the ordinary sense of mankind. Nothing could be simpler than the words " arising out of and in the course of the employment." It is clear that there are two conditions to be fulfilled. What arises " in the course " of the employment is to be distinguished from what arises " out of the employment." The former words relate to time conditioned by reference to the man's service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment—that is, directly or indirectly engaged on what he is employed to do—gives a claim to compensation, unless it also arises out of the employment. Hence the section imports a distinction which it does not define. The language is simple and unqualified. I do not know that attempts to amplify the language or define the dividing line have been very illuminating, though help in deciding any particular problem may be obtained by examining actual reported cases, not generally as laying down principles of law, but as showing how, in particular circumstances of fact, the dividing line has been drawn. It is not legitimate to seek to write into the section definitions and limitations which the legislature have not thought fit to insert. It seems that Earl Loreburn, L.C., in *Warner* v. *Couchman* (5), at p. 37, had something like this in mind when he referred to cases under the Act which

> . . . stated the law fairly enough, or rather stated what was the point of view with which a judge ought to approach cases of this kind.

However, Earl Loreburn, L.C., manifestly did not mean that, if this House has laid down a definite canon of construction, it has not to that extent stated the law.

There have, indeed, been many attempts which may be found in the authorities to define or describe the distinction. As was said by Lord Dunedin in *Upton* v. *Great Central Ry. Co.* (6), at p. 310 :

> . . . the distinction between accidents which happen to a man and are, so to speak, brought on him by his business, and accidents which, although a man may in one sense be on his business, are just accidents which may happen to everybody, is a very fine one.

However, the distinction may in some cases, as to my mind it is in the present case, be clearly marked. Thus Lord Dunedin in *Upton's* case (6), at p. 310, quotes Lord Kinnear as saying in *Millar* v. *Refuge Assurance Co., Ltd.* (7), at p. 43 :

> "I think that a risk is specially connected with a man's employment if it is due to the particular place where his employment requires him to be at the time."

In the same case, Viscount Haldane said, at p. 307, that the conditions necessary to enable it to be said that an accidental injury arose out of the man's employment must be

> . . . such that the accident has some sort of causal relation with them, although not necessarily an active physical connection.

Similar statements might be multiplied, but it may be that they often go no further than writing out at length the simple words of the Act, and perhaps in some cases eliminating fallacious accretions which have overlaid the language of the Act in the course of judicial decisions. Thus, in cases before *Thom* (*or Simpson*) v. *Sinclair* (1), it seems to have been held that the necessary connection must be between the nature of the employment—that is, the actual work which the man was employed to do—and the accident. However, the Act says "arising out of the employment," not out of the nature of the employment. Hence this House held in *Thom's* case (1) that a girl employed to work at fish-curing in a building was entitled to claim compensation when she was injured through part of the building falling on her, though the collapse of the building was due to causes external to the building. The work was not inherently dangerous, but, as my noble and learned friend Lord Russell of Killowen (then Russell, L.J.) said in *Lawrence* v. *Matthews* (*George*) (*1924*), *Ltd.* (8), at p. 19 :

> . . . sufficient causal relation or causal connection . . . is established if the man's

> employment brought him to the particular spot where the accident occurred and the spot in fact turns out to be a dangerous spot.

My noble friend there used the word "spot" because in the special facts of that case the dangerous place was a "spot," or very limited area—namely, the particular place in the road where the tree which injured the man while he was travelling on his duty happened to fall. The risk was in a sense "necessarily" incident to the performance of the servant's work (to quote from a further passage from the judgment of LORD RUSSELL OF KILLOWEN in that case), but that statement is true only if taken to refer to the way in which things in fact turned out, not to what normally happens to a traveller by road in England. Many other illustrations could be given of instances where it has been held that an accidental injury sufficiently arises out of the employment if it befalls a man simply because of the place into which he is sent or taken by his employment. Thus, in *Dennis* v. *White* (*A. J.*) *& Co.* (2), a boy's employment required him to proceed by bicycle through the streets. He was knocked down and injured. It was nothing to the point that everyone who bicycles in the street incurs a similar risk, or that the risk is general and ordinary. As LORD FINLAY, L.C., said, at p. 483:

> . . . the accident was . . . necessarily incidental to the performance of the servant's work, all inquiry as to the frequency or magnitude of the risk is irrelevant.

I have referred to these important decisions as illustrating how eminent judges have approached cases of this kind. It would be futile to attempt to cite or reconcile all the decisions on the construction of these words of sect. 1. They are often merely decisions of fact, though some seem to involve reading into the section words which are not there or ideas which are not expressed in it. Indeed, in cases of this type, once the actual facts are ascertained, it is for the court to ask itself whether, on those facts, the accidental injury arose out of the employment. In the present case, the answer to the question seems clear and inevitable. The seaman sustained the fatal injury because his employment took him to a river or a roadstead or a sandbank on which his vessel grounded on the West Coast of Africa. Though the circumstances are different, he was as much exposed by the exigencies of his employment to the risk of being bitten by the mosquitoes as Mrs. Thom was exposed to the risk of the falling building, or the boy Dennis to the risk of being run over in the street. The infliction of the bites was an accident. In essence, it was the same as if the crew had been assailed by a flight of poisoned arrows aimed at the ship by a raiding party of natives. If one takes the facts as they have been found, the claim to compensation appears to be unanswerable on the words of the section, or, indeed, if analogy and authority are also considered, on the decided cases.

It is sought to evade this conclusion by a series of arguments which, with all respect, I find both artificial and unauthorised by the language of the Act. In effect, it is argued, mosquitoes are a force of nature to which everybody in the geographical area, which is here the particular region on the West Coast of Africa, is equally subject. It is a normal risk, so it is said, affecting alike natives and visiting strangers such as the crew. It is hence a normal risk of the region. The standard of normality, it is said, is that of the ordinary person in that region, so that it is irrelevant that the deceased man was brought into that area and exposed to the poisonous elements there rampant by the exigencies of his employment. On the basis of these contentions, it has been submitted that, before the claim can be maintained, it must be shown that the deceased man was exposed in an abnormal degree to the ordinary dangers of the region, which, it is said, is not shown here.

No doubt it has often been said that, if a workman, while on his employment, is accidentally injured by a force of nature which is operating generally in the area where he is, he cannot recover unless he can show that his employment exposed him in a degree beyond that of other people then present in the area to the injurious effects of the natural force. Thus it has been held that a man struck by lightning cannot recover compensation under the Act unless his employment placed him in a position in which he was peculiarly exposed and vulnerable. The same has been said of exposure to extremes of heat and cold which are endemic in the region. Everybody then present in the place, whether employed or not, is subject to the same heat and cold. To associate the evil consequences of the exposure causally with the employment, so that they can be said to arise out of it, there must be some special exposure consequent on the employment beyond that of the common lot of those in the place or region, as in *Brooker's* case (3), where a number of men were injured in consequence of an earthquake, which caused havoc over a large area in New Zealand. The New Zealand Act is, for this purpose, identical with the English Act. The Court of Appeal in New Zealand had rejected the claims, on the ground that the risk was common to everybody in the area, and that the injuries sustained by the men were caused by a natural force which had no particular relation to their employment. The risk of the earthquake affected everybody in the neighbourhood, whether employed or not. The fact of their employment was irrelevant. Hence, it was held that, though the accidents arose in the course of the employment, they did not arise out of it. The Privy Council reversed the judgment of the Court of Appeal of New Zealand, on the ground that, on the facts, the injuries could be sufficiently associated with the men's employments. Thus, one was killed by the collapse of the building in which he was working, so that the case was analogous to *Thom's* case (1), though the collapse was in fact due to the earthquake. Another man, by reason of the earthquake shock, lost his balance and fell from the top of a high sheep-race where his duty had taken him. Another claimant had been sent to do some shopping, and was killed by the collapse of the shop just as he left it. Thus there was in each case a special risk associated with the employment, and the position was different from what it would have been if the claimant had been situated like his fellow-citizens, whose employment did not expose them to any peculiar risk. It could not be said that the men would equally have been injured, whether employed or not. The claims were accordingly upheld, and the decision of the Court of Appeal of New Zealand reversed.

In the present case, I do not know that the deceased man was subject to any special or peculiar risk of being bitten beyond that of the natives. Indeed, the county court judge expressly finds that, to the sailor on board ship, the risk of a mosquito bite is no more a danger than it is to any inhabitant of a house or hut in the locality. I shall assume that his finding was justified, but it appears to me to be irrelevant. The seaman is exposed to the risk, not because he is an inhabitant of the place, but because he is specially taken to the dangerous place by his employment. The position of a seaman under the Act is in many ways peculiar, because his employment may expose him to risks in strange climates outside the limits of this country. In that way, such risks are not normal to him, but are necessarily incidental to his employment. It is, in my opinion, fallacious to treat as normal to him risks which are normal to the ordinary inhabitant of the place, who is not there because of special employment, like the seaman. If analogy were needed, it may be pointed out that the boy in *Dennis's* case (2) only took the risks which everybody who bicycles in the street takes, but he was held entitled to compensation because he took those risks on his employer's work. Mosquito bites on the West African coast are very unlike a street accident in an English town, but they are analogous in the respect essential for the purposes of this case—namely, that in each case the employee met with the accident because he was sent by his employer to the place where the danger was. If anything inconsistent with this was decided in *Karemaker* v. *Corsican (Owners)* (4), it was, in my opinion, wrongly decided. As to *Warner* v. *Couchman* (5), this House decided that case purely as on a finding of fact.

It has been said that, if this claim is upheld, it will have far-reaching consequences. For instance, it is said that it would follow that, if a seaman who was sent on his ship to a British port, say Southampton, where influenza was rife, caught the disease, he would have a claim. That case, however, is so different in so many respects from the present that I do not feel called upon to discuss it. It is enough for me that, in my opinion, on the facts of this case, there was an injury by accident which arose out of the employment. I agree with the Court of Appeal, and would affirm their judgment.

Appeal dismissed with costs.

Solicitors: *Botterell & Roche*, agents for *Botterell, Roche & Temperley*, Newcastle-upon-Tyne (for the appellants); *Barnett Janner*, agent for *Winskell & Walker*, South Shields (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

ALEXANDER *v.* H. BURGOINE & SONS, LTD.

[Court of Appeal (Slesser, Clauson and Goddard, L.JJ.), **December 1, 1939.**]

Practice—Trial—Hearing—Trial before jury—Speeches of counsel—No witnesses called for defence—Right of defendants' counsel to invite jury to stop case. A

In a civil case tried in the King's Bench Division before a judge and jury, counsel for the defendants, at the close of the plaintiff's case, addressed the jury and suggested to them that they should stop the case. It was contended that counsel for the defendants, not intending to call evidence for the defence, was entitled to suggest to the jury that they ought to stop the case :— B

Held : it is not in accordance with the proper practice for an invitation to stop the case to be given to a jury by counsel before the judge has summed up. The judge in his discretion may invite the jury to dispense with a summing up, but that is a matter entirely in the discretion of the judge.

[**EDITORIAL NOTE.** The order of speeches in a jury trial is well settled, but the present case deals with a point which seems to go beyond the usual rules, and one which has admittedly given difficulty in practice. An invitation to the jury to stop a case is a matter for the judge, and it is clear that, if counsel for a defendant does not intend to call evidence, he must not address the jury at the close of the plaintiff's case, but must declare his intention not to call evidence, so that counsel for the plaintiff can then exercise his right of summing up his case to the jury before counsel for the defendant does so. It must be noted, however, that this decision is confined to civil cases, and is not properly applicable to criminal cases. C D

As to Speeches of Counsel, see HALSBURY, Hailsham Edn., Vol. 2, pp. 540-542, paras. 735-737 ; and for Cases, see DIGEST, Vol. 3, pp. 348-352, Nos. 380-439.]

E

Appeal by the defendant company from the verdict of a common jury and the judgment given by Macnaghten, J., dated July 21, 1939. The action was a claim against the defendants for damages for injury caused by the negligence of a lorry driver employed by them. The facts are not material to the point of law on which the case is reported. F After the close of the plaintiff's case, counsel for the defendants, although he was to call no evidence, addressed the jury, and, in doing so, suggested to them that they could stop the case and say they had heard enough. Thereupon the judge said that, if counsel for the defendant addressed the jury at the close of the plaintiff's case, it indicated that he was going to call G evidence, and that, if he did not call evidence, counsel for the plaintiff was entitled to sum up. Counsel for the defendants then submitted that, subject to the right of counsel for the plaintiff to address the jury again, when the plaintiff's case was complete, the jury were at any time entitled to stop the hearing and say that they had heard enough. The judge replied that H he had heard that observation before, and that he thought that it was a very unfortunate one, because it indicated that the jury could come to a conclusion before they had heard all the evidence they ought to have heard. It might, he said, be becoming to a judge to indicate to the jury that they might stop the case, but it was not becoming to counsel. If counsel wished to submit that there was no evidence fit to be left to the jury, he should do so at the close of the plaintiff's case. The judge said that his observations, however, applied only to running-down cases. Where, for instance, a man brought an action for libel, and, on cross-examination, turned out to be a traducer of women and obviously a man of no character, it was very often said that the jury could not want to hear any more of that man, because his character was obviously of no value. The judge then directed the jury that they ought not to come to a final decision until they had heard the whole of the case for each side and the summing up. The course of procedure of intimating that a concluded opinion might be arrived at in the course of a case when persons were sitting in the jury-box and had had no opportunity of consulting among themselves as to what their decision should be might lead to great inconvenience, as well as to injustice. The judge permitted counsel for the defendants to address the jury again, and then summed up. The jury returned a verdict for the plaintiff, with £400 damages. The judge gave judgment, accordingly, with costs, and the defendants appealed, on the ground, *inter alia*, that the judge was wrong in law in refusing to allow counsel for the defendants to invite the jury, subject to hearing counsel for the plaintiff, to stop the case when the plaintiff's evidence was complete.

N. R. Fox-Andrews for the appellants.

Charles Doughty, K.C., and *Neil Lawson* for the respondent.

GODDARD, L.J. [delivering the judgment of the court]: The only point of interest which is raised upon the notice of appeal is this. It seems that, at the close of the plaintiff's case, counsel for the appellants started to address the jury. If he was not going to call any evidence, he should, of course, have said so, because then counsel for the respondent would have summed up the case for the plaintiff. Whether or not counsel for the appellants had made up his mind at that time that he was not going to call evidence I do not stay to inquire, but it appears that, when he was addressing the jury, he invited them to stop the case, after telling them—perfectly properly—that counsel for the respondent would have the right to address them, and that they could then stop the case if they liked. In other words, he invited them to express an opinion before they had heard the judge's summing up. One complaint which was raised here, though it has not really been persisted in by counsel for the appellants, was that the judge was wrong in expressing the opinion that this was not a right thing to do, and that counsel was not entitled to ask the jury to stop the case in this way.

This is a matter which has arisen in my own experience on more than one occasion, and I think that I may say with some certainty that the opinion of the judges is, and always has been, that it is not correct for counsel to ask the jury to stop the case at any particular time, because counsel is not entitled to interfere, so to speak, between the judge and the jury. A judge, when the case has been heard, may, and not infrequently does, say to a jury in a case which appears to be perfectly clear: "Gentlemen, do you think it will be of any assistance to you if I sum up, or do you think you can give an opinion at once?" Judges, indeed, have said that to juries in cases such as MACNAGHTEN, J., instances—for example, a libel case where a man is complaining of libel, and, after cross-examination has shown that he has no case at all, the judge sometimes turns to the jury and says, "Have you heard enough of this case?" although the judge should then be careful to say that the plaintiff's counsel has still the opportunity of addressing them if they wish.

We think, however, that it ought to be understood that it is not in accordance with proper practice for an invitation to stop the case to be given to a jury by counsel before the judge has summed up. If the judge thinks that it is a case in which he may invite the jury to dispense with a summing up, that is a matter entirely in the discretion of the judge. No one is censuring counsel for the appellants for what happened in this case, because it has certainly been done, and sometimes done without objection, from the Bench, but the objection, of course, is that there ought to be no interference in the course of the trial between the judge and the jury. MACNAGHTEN, J., who took that view—which, in the opinion of this court, is the right view —limited his remarks, I notice, to civil cases, because any question as to what would arise in a criminal case would very properly be dealt with by the Court of Criminal Appeal, and not by this court, which has no jurisdiction in criminal matters. I therefore abstain from saying what my experience was as a judge in criminal cases, and, as the judge below did, I limit what I have said to cases which are tried on the civil side of the King's Bench Division. The result is that this appeal fails and will be dismissed.

Appeal dismissed with costs.

Solicitors: *Hewitt, Woollacott & Chown* (for the appellants); *Butt & Bowyer* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

WOODING v. MONMOUTHSHIRE AND SOUTH WALES MUTUAL INDEMNITY SOCIETY, LTD.
JAMES v. SAME.
HAWKINS v. SAME.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Russell of Killowen, Lord Wright and Lord Romer), **November 16, 20, 21, 22, December 13, 1939.**]

Workmen's Compensation—Insolvency of employer—Liability of insurers to workman—Mutual indemnity society—Non-payment of calls—Workmen's Compensation Act, 1925 (c. 84), *s.* 7.

A mutual indemnity society by the terms of its memorandum and articles of association protected a colliery company against its liabilities under the Workmen's Compensation Act in respect of all workmen who had not contracted out of the Act. Originally the arrangement was that for the first 18 months after any accident the company in effect met all payments due to the injured workman, but, upon the expiration of that period, the liability in respect of each injured workman was to be actuarially assessed, and a call for such sum was then made upon the company. The 18-months' indemnity period above referred to was later altered to 5 years. A receiver of the company was appointed by debenture holders, and an injured workman thereupon claimed compensation from the indemnity society under the Workmen's Compensation Act, 1925, s. 7. The society repudiated this claim, on the ground that the calls from time to time made upon the company in respect of the injured workman had not been paid at the date of the appointment of the receiver, which was found to be the fact :—

HELD : (i) the contract of insurance was subsisting at all material times, and the rights of the employers against the insurers vested in the workman.

(ii) those rights consisted of an indemnity against the payment of any compensation in respect of all workmen injured during the material period.

per LORD WRIGHT : I cannot dissect the contract into two periods, or split the transaction into two disparate bargains. As part is insurance, I think the whole must be, and in any event to my mind is, insurance.

Order of Court of Appeal ([1938] 3 All E.R. 625) *reversed.*

[**EDITORIAL NOTE.** Two questions arise in this case. The first is whether the matter was one of insurance, the difficulty being that during the first five years the insured were to pay to the insurers all moneys paid under the indemnity. The other question is whether the consideration for the insurance was collective or several. If the consideration was collective then the failure to make the appropriate payment in respect of individual workmen did not defeat the obligation to indemnify and this is the view taken by the House.

AS TO LIABILITY OF INSURERS ON INSOLVENCY OF EMPLOYER, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 191, 192, para. 423 ; and FOR CASES, see DIGEST, Vol. 29, pp. 406-408, Nos. 3204-3213. See also WILLIS'S WORKMEN'S COMPENSATION, 31st. Edn., pp. 204-214.]

Cases referred to :

(1) *Pailin* v. *Northern Employers' Mutual Indemnity Co.*, [1925] 2 K.B. 73 ; 29 Digest 407, *3210* ; 133 L.T. 77 ; 18 B.W.C.C. 32.

(2) *British Equitable Assurance Co., Ltd.* v. *Baily*, [1906] A.C. 35 ; 10 Digest 1069, *7482* ; 75 L.J.Ch. 73 ; 94 L.T. 1 ; *revsg.* S.C. *sub nom. Baily* v. *British Equitable Assurance Co.*, [1904] 1 Ch. 374.

(3) *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111 ; 29 Digest 415, *3248* ; 66 L.J.Q.B. 119 ; 75 L.T. 531.

(4) *Universo Insurance Co. of Milan* v. *Merchants Marine Insurance Co.*, [1897] 2 Q.B. 93 ; 29 Digest 82, *416* ; 66 L.J.Q.B. 564 ; 76 L.T. 748.

(5) *Bhugwandass* v. *Netherlands India Sea & Fire Insurance Co. of Batavia* (1888), 14 App. Cas. 83 ; 29 Digest 75, *341*.

(6) *Daff* v. *Midland Colliery Owners' Mutual Indemnity Co.* (1913), 82 L.J.K.B. 1340 ; 29 Digest 407, *3206* ; 109 L.T. 418 ; 6 B.W.C.C. 799.

APPEAL from an order of the Court of Appeal (GREER and MACKINNON, L.JJ., SLESSER, L.J., dissenting), dated July 28, 1938, and reported [1938] 3 All E.R. 625, affirming an award of His Honour JUDGE THOMAS at the Tredegar County Court, dated Jan. 20, 1938. The facts and the arguments are set out in the opinion of VISCOUNT MAUGHAM.

Gilbert J. Paull, K.C., and *A. L. Macmillan* for the appellants, the workmen.

H. Wynn Parry, K.C., and *J. P. Ashworth* for the respondents, the indemnity society.

Viscount Maugham [read by Lord Thankerton]: My Lords, we have before us three appeals by three workmen, Wooding, James and Hawkins, all of them employed by the Ebbw Vale Steel, Iron and Coal Co., Ltd. They were injured by accidents arising out of and in the course of their employments at the following dates—namely, Wooding on Aug. 24, 1923, James on Apr. 27, 1923, and Hawkins on Apr. 15, 1929. Subject to certain defences of a special character, which will be dealt with later, it is admitted that Wooding is entitled as against the Ebbw Vale company (which I shall call the company) to compensation at the rate of £1 15*s*. per week, James to compensation at the rate of £1 2*s*. 6*d*. per week, and Hawkins to a declaration of liability. These liabilities arise under the Workmen's Compensation Act, 1925. The claims of the appellants in this case are not, however, against the company, but against the respondent society (which I shall call the society), who are alleged to be insurers of the company in respect of its liability to the three workmen. A receiver of the business of the company was appointed on Oct. 21, 1936, on behalf of holders of debentures secured by a floating charge. The appellants therefore contend that the rights of their employers (the company) against the society are now vested in them under the Workmen's Compensation Act, 1925, s. 7, which provides as follows:

> (1) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or, if the employer is a company, in the event of the company having commenced to be wound up or a receiver or manager of the company's business or undertaking having been duly appointed, or possession having been taken, by or on behalf of the holders of debentures secured by a floating charge, of any property comprised in or subject to the charge, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

In these circumstances, three arbitrations took place in the county court of Monmouthshire before His Honour Judge Thomas, who held, following the decision of the Court of Appeal in *Pailin* v. *Northern Employers' Mutual Indemnity Co.* (1), that the society were not, at the material times, insurers so as to confer on the workmen the rights specified in sect. 7. He therefore made awards in favour of the society. There was an appeal to the Court of Appeal, and that court by a majority (Greer and MacKinnon, L.JJ., Slesser, L.J., dissenting) dismissed the appeal. The matter now comes before your Lordships.

A certain number of letters and other documents was put in evidence before the county court judge, and a certain number of facts was agreed. The society by their particulars denied their liability to pay compensation on three main grounds. First, they denied that at any material time they were insurers of the company. Secondly, they relied on the fact that the names of the three workmen were not contained in certain lists of cases of accidents which were outstanding at particular dates, and they asserted that their liability to indemnify the company in respect of the three workmen had thus been terminated. This contention requires for its consideration the statement of a number of further circumstances, and was based on various legal arguments. Thirdly, they contended that any liability of the society to pay compensation to the company terminated on the appointment of the receiver. This last point, however, was abandoned on the hearing before your Lordships, and need not be further considered. There was also an argument based on estoppel, which is not now insisted on. I think it is important to state that the society in their particulars never raised the contention that, at the date of the appointment of the receiver, they had any right or remedy by way of set-off, cross-claim or otherwise against the company, nor did they at any time assert that the company had made default in payment of any premium or any call demanded by the society, and no evidence was given that any such demand or call was made and not paid.

The terms of the contract of insurance relied on by the appellants are to be gathered from the memorandum and articles of association of the society, for no insurance policy was issued by them at any relevant time. The society was incorporated on June 25, 1898, as a company limited by guarantee. Its main object was " to indemnify the members of the society against the payment of any compensation or damages payable under," amongst other Acts, the Workmen's Compensation Acts in respect of accidents to workmen employed at any mine in which any member of the society might be interested and to which the Coal Mines Regulation Acts or certain other Acts should apply. The articles provide for a mine-owner becoming a member of the society, for mines of any member being entered in a register of protected mines, and for " mutual insurance against ordinary accidents " in accordance with elaborate and complicated regulations contained in the articles. We are only concerned on these appeals with " ordinary " accidents, as the appellants only suffered from such accidents. The company was at material times a member of the society, and its mines were entered in the register of protected mines. There is no doubt that the company, having complied with these requirements in and prior to 1923, was entitled to indemnity from the society against ordinary accidents, and was bound to pay " calls " of the nature of premiums like other members, in order that the society might thereout provide the stipulated indemnity to all the members.

My Lords, it will be remembered that two of the appellants met with their accidents in 1923 and the third in 1929. The original articles of 1898 were in force as regards accidents taking place in 1923, but, by a special resolution confirmed on Apr. 12, 1927, the original articles were modified in certain material respects. In particular, a new art. 13A was inserted, a new art. 15 was substituted for the old art. 15, and a new art. 35 was substituted for the old art. 35. A question of some difficulty arose in the courts below as to whether the amended articles, after they came into force, would apply to (amongst others) accidents which had occurred in 1923—in other words, whether the new regulations as to calls, compensation and so forth in the amended articles had any operation as regards previous accidents in respect of which compensation remained payable. It is at least doubtful whether, in the circumstances, it makes any difference to the result of this appeal or which view is to be taken, and counsel on each side, who, I may say here, argued for their clients with both skill and discretion, were willing, for the purposes of the appeals, to assume that the amendments of 1927 applied to the accidents prior to that year, so far as compensation remained payable in respect of them, as well as to subsequent accidents. It is not, therefore, necessary for your Lordships to embark on the vexed question as to the effect upon a contract, the terms of which are to be gathered from articles of association, of an alteration of those articles under the statutory power. The true meaning and effect of the Companies Act, 1908, ss. 13, 14 (now replaced by the Companies Act, 1929, ss. 10, 20), must be left for consideration by this House at some future time, and *British Equitable Assurance Co., Ltd.* v. *Baily* (2), where there is an illuminating opinion by LORD MACNAGHTEN, will also have to be examined.

In what follows, I shall deal with the amended articles as those on which the present case must turn. There was, however, a further change on Dec. 19, 1932. On that date a new set of articles was adopted by the company in substitution for, and to the exclusion of all, existing articles (except as therein mentioned) as from Jan. 1, 1933. These articles provided for a new system by the issue of policies of insurance to the members. Art. 3, however, provided that, for the purpose of discontinuance of the old system, certain transitional provisions in the appendix should have effect. Clause 7 of these provisions stated that (subject to cl. 8 and to certain other matters) the ordinary accident fund and its assets and liabilities should be taken over by the society. Clause 8 provided that the ordinary accident accounts for the accidents occurring in 1928, 1929, 1930, 1931 and 1932 should be dealt with under the existing articles, but the directors might fix a period earlier than 5 years from the beginning of any of such years for the purpose of a final call under art. 35 (*g*), (*h*), (*i*), of the amended articles, and that, on the closing of each of such accounts, the assets and liabilities thereof should be taken over by the society. Clause 11 provided that, for the purpose of the transitional provisions, arts. 24 to 36 of the existing articles of association should continue, where necessary, to have effect and to bind the society and every member so far as concerns the keeping of accounts and the making of calls, the liability of members to make payments or contributions, and the liability of the funds to contribute to the society's expenses.

On the footing that the cases of Wooding and James were, and had A remained, 1923 cases, these new articles do not seem to affect their cases, since the five-year period had come to an end, and the final calls should have been made and paid pursuant to art. 35 (*g*), (*h*). Hawkins' was a 1929 case, and therefore cl. 8 would apply to him and also arts. 24 to 36 of the amended articles to the extent mentioned in cl. 11.

B My Lords, I have had the advantage of reading the opinion of my noble and learned friend LORD WRIGHT, and I am unwilling to take up time in an elaborate statement of the articles as amended, since I find in that judgment all that I should myself like to say on the subject. The respect I have for the opinions of GREER and MACKINNON, L.JJ., from C whom I feel compelled to differ, makes it necessary for me to indicate in my own words the reasons for my conclusion.

I agree with the view of the Court of Appeal that, under the system laid down by the amended articles, there were two periods in relation to the accidents of each member of the society. The accidents for each D year were kept separate, and the first period for these accidents was 5 years from the commencement of each year, and during that period—e.g., at the end of 1927 in respect of the accidents to Wooding and James in 1923—the directors of the society were to make "provisional calls" on the member concerned in respect of accidents in that year of an amount E in the opinion of the directors sufficient adequately to provide the moneys required to indemnify such member against all compensation and damages payable by such member in respect of the ordinary accidents at his mine in that year. The sum so paid had to be credited to an "ordinary accident account" for that year between such member and F the society, and the society had to discharge all sums payable by the society in respect of those accidents (art. 35 (*d*), (*e*), and see also art. 35 (*i*), which provides for final adjustment of the ordinary accident account).

During this five-year period, therefore, dating from any particular year, it is agreed that each member bore his own liability for all the G accidents at his mine in that year. I agree with the view of the Court of Appeal that this is not, so far, a contract with insurers within the meaning of the Workmen's Compensation Act, 1925, s. 7. However, this is only the first part of the story, for at the end of the five-year period the directors had

H

> . . . to assess or estimate . . . (on an actuarial basis so far as practicable) the amount of the outstanding liability of each member protected under this article to pay compensation or damages in respect of ordinary accidents which occurred during the particular year.

That is art. 35 (*g*). A "final call" had then to be made on each member in respect of the particular year of the amount or estimated amount of his outstanding liability (art. 35 (*h*)). This closed the account between the member and the society as regards the accidents for that year. The member was under no further liability to the society in respect of those accidents, and the society had to indemnify the member against all liability in respect of them. The amount of the " final calls " went into the ordinary accident fund of the society. These calls were no longer kept separate, but, to use a popular phrase, they went into the common pool, and the society out of its assets indemnified all the members as regards all accidents of that particular year. Insurance is none the less insurance because it is mutual, and I think it is clear that, as regards this second period, the contract was one of insurance, and the society was an insurer in respect of the liability of any member as regards accidents of the year in question. The Court of Appeal seems to have agreed in that view. The decision in *Pailin* v. *Northern Employers' Mutual Indemnity Co.* (1), on which, as I have said, the county court judge relied, would not apply to liabilities existing in the second period.

There is, however, a curious point affecting the five-year periods on which the respondents place reliance as regards the claims of Wooding and James. It is based upon the amended art. 35 (*b*), which was a new subclause in 1927. It provides in effect that, where a workman wholly or partially incapacitated by an accident :

> . . . recovers and ceases to be entitled to compensation and such total or partial incapacity recurs so as to entitle him to compensation without his being involved in any fresh accident, such recurrence shall be deemed a fresh accident happening when the recurrence takes effect.

This provision, where it applies, has the effect of causing a new five-year period to begin, during which the member is in effect his own insurer, and of postponing for five years the making of a final call on him. The appellants Wooding and James, however, dispute that the provision applies to them.

In my opinion, the words " recovers and ceases to be entitled to compensation " in this subclause cannot be read as if the word " recovers " were omitted, and that word, in my view, must, in the absence of any reason to the contrary, indicate a recovery which restores the man to his pre-accident state of health and capacity so far as relates to the consequences of the accident—in other words, a recovery which will enable him to compete for employment in the open market on the same terms as if the accident had not happened. There may still be recurrence of incapacity, because it is well known that there are many injuries which leave in some organ a latent weakness or defect which may not become manifest except as the result of renewed work and strain. If this view is correct, it is quite plain on the admitted facts that neither Wooding nor James had ever recovered from his accident, and, indeed, the contrary is not asserted. The result is that, upon the true construction of art. 35 (*b*), neither Wooding nor James ceased to be a case of the 1923 class.

It is argued, however, that, on Jan. 23, 1929, the respondents transferred or purported to transfer the case of Wooding from the class of 1923 to that of 1928, and that at a later date the case of James was transferred from 1923 to 1932, both transfers being alleged to be made under art. 35 (*b*). On the view I have taken of the facts and the true construction of the article, such transfers could only be relied on as effective if there had been an agreement between the employers and the society so to transfer the cases. No such agreement was set up or alleged, and the evidence as it stands is, I think, insufficient to establish anything more than a mistake as to the construction of the article. The conclusion must, therefore, be that the five-year period as regards both Wooding and James ended on Dec. 31, 1927, and there should then have been an assessment of the outstanding liability of the company in respect of their ordinary accidents (including those of Wooding and James) during 1923 (art. 35 (*g*)), followed by a "final call" on the company under art. 35 (*h*).

It is at this stage that we come to the most singular and troublesome circumstance in the case. On May 19, 1928, the society wrote a letter to the company which contained the following paragraphs:

> 1923 Cases.
>
> Dear Sirs,
>
> I beg to enclose a statement showing the list of cases of accidents and industrial diseases which occurred at your collieries and works during the 12 months to Dec. 31, 1923, and which were outstanding and in which compensation was being paid as on Dec. 31, 1927.
>
> You are probably aware that under the terms of the society's articles of association all future liabilities arising from these accidents are now taken over by the society.
>
> Before making the final financial adjustments in regard thereto, I should be much obliged if you would kindly confirm whether these cases agree with your records of outstanding cases.
>
> I am to add that the figures shown as to the outstanding liability arising from these accidents have been assessed on the basis of the Post Office annuity tables, and that cases on full compensation have been dealt with on the actual amount of weekly compensation paid, and cases on light work on the actual partial compensation when such payments have exceeded 10*s.* per week and on a minimum of 10*s.* when payments have been less than 10*s.* per week; excepting cases which have been settled since Dec. 31, 1927, when the outstanding liability has been assessed for the actual payments made since that date.
>
> Kindly sign the enclosure when returning it to me. A formal statement, embodying this assessment, will be sent to you at a later date, setting forth your company's position relative to the whole of your accidents which arose during the 12 months to Dec. 31, 1923, together with any further observations which it may be deemed necessary to make in regard to the matter.

The list enclosed included the names of those workmen only who had met with accidents at the company's mines which were outstanding and in which "compensation was being paid as on Dec. 31, 1927." The list, as it happened, included by mistake the name of Wooding, whose weekly compensation on Dec. 31 was said to be 35*s.*, and the valuation of his case (on an actuarial basis) was stated to be £1,221. The list did not contain the name of James, and it is to be presumed that he was known not to be in receipt of compensation on Dec. 31. The company returned the list omitting the names of Wooding and some other workmen who were not in receipt of compensation on the date named. No evidence was given of any discussion or interview between the officers of the company and of the society on this important matter. The only witness called at the hearing was the secretary of the society, who proved the correspondence which was put in, and we are left to draw our own conclusions from that correspondence. The result of the course adopted was certainly important. The list sent by the society to the company would have justified a call of £13,139 in respect of the 1923 accidents, less credits due to the company in respect of their ordinary accident account. The list returned by the company reduced the figure of £13,139 to £9,223, the reduction being made up of items including the £1,221 in respect of Wooding. The society on July 31, 1928, made a final call in respect of the 1923 accidents of the company of £9,223 (the figure abovementioned), less a credit due to the company of £6,406 17*s.* 9*d.*, leaving a balance payable to the society of £2,816 2*s.* 3*d.*, which was to be paid according to the letter on Feb. 28, 1930, as a result of a resolution of the directors. It was further stated that failure to pay on the date mentioned would render the company liable to be charged with interest at a rate to be determined by the directors.

On the basis of these facts, there is raised what is, I think, the main point made by the respondents in their particulars and in the argument before your Lordships. It is that the case of Wooding was not included by the company in the lists passing between the company and the society as a liability outstanding on Dec. 31, 1927, nor on Dec. 31, 1932. Precisely similar allegations, with some alterations of dates, are made in the answers and particulars as to the claims of James and Hawkins. If these allegations were true in a sense which would lead to the inference that the company and the society had agreed that the society would have no further liability in respect of compensation to the three men after the dates mentioned, the point would be a most serious one. The point, however, becomes untenable as soon as the language of the society's letter of May 19, 1928, is carefully examined. The society was endeavouring, as the letter shows, to act in accordance with art. 35 (*g*) of the amended articles, and to estimate the amount of the outstanding liability of the company in respect of ordinary accidents in 1923. On the last day of 1927, the five-year period had come to an end. The 1923 cases were of three kinds—namely, (i) those on full compensation on Dec. 31, 1927, (ii) those on light work in which partial compensation was being paid at that date (sometimes more than 10*s.* per week and sometimes less), and (iii) cases where, on the said date, the man was being paid (generally for light work) a wage not less than the full compensation he would have received if not employed. The fourth paragraph of the letter (beginning with the words "I am to add") explains how the directors had assessed the total outstanding liability of these cases on an actuarial basis, so far as practicable. They took as a basis the Post Office annuity tables, and applied them in relation to the age of each workman as if he were a normal life. Thus Wooding, aged 33, at 35*s.* per week (his maximum weekly compensation), was reckoned as a liability amounting to no less than £1,221. To the second class they applied a rough-and-ready method, probably because the partial compensation which was being paid was variable. If the man was in receipt of A more than 10*s.* (e.g., Henry Butcher, who was in receipt of 13*s.* 2*d.*), they treated him as in receipt of 10*s.* for life, and, if in receipt of less than that sum (e.g., Thomas Crewe, who was in receipt of 4*s.* 4*d.* per week), they treated him also as in receipt of 10*s.* per week. There remained the third class, those who were temporarily back at work at wages B equal to, or in excess of, full compensation, but who were liable from time to time to have a recurrence of their incapacity owing to the original accident in 1923. These men were not in receipt of compensation on Dec. 31, and, therefore, the Post Office annuity tables could not be applied to them, unless, indeed, there were made some estimates on C medical grounds of the average sums which the men might get in the future, which would be a departure from the actuarial system on which the directors were proceeding. The directors had clearly determined to leave these cases out of their assessment, presumably relying on the other figures to provide a sufficient assessment to enable the society to D discharge on the average their liabilities in the future in respect of all the 1923 cases of all the members. There can have been no mistake as to this. The first paragraph of the letter as well as the fourth are perfectly clear, and the list of workmen in the schedule relates only to workmen in receipt of compensation on Dec. 31, 1927. The list sent back by the E company omitted the names of 6 workmen, including the name of Wooding, as not being cases in which compensation was being paid on Dec. 31. On this footing, the liability of the company in respect of 1923 accidents was fixed at £9,223.

This sum, I repeat, was assessed by the directors of the society under F art. 35 (*g*). It represented:

> . . . the amount of the outstanding liability of each member protected under this article to pay compensation or damages in respect of ordinary accidents which occurred during the particular year.

I read that as meaning that all the outstanding liability of the member G was to be assessed. The view that the letter was intended to have the effect of releasing the society from all liability as to men not in actual receipt of compensation on Dec. 31 is really an extraordinary one. It would release the society from risk as regards men merely entitled to a declaration of liability. It would also release them from risk in relation H to all men who had just come back to work after a long period of incapacity and who might permanently break down in a few weeks or months. It would also release them from risk as regards a permanently injured man employed on light work, e.g., as a doorkeeper, at wages as large as the compensation payable to him if he was not so employed. Nor can any reason be suggested, in the case of such a mutual insurance society as that with which we are now dealing, for so strange a result. The objects and the articles of the society clearly contemplate provisions dealing with all ordinary accidents at all the protected mines.

My Lords, I cannot think that these letters, or the facts which they disclose, can justify the contention that the society was being released from future liability in respect of the men who happened not to be included in the lists because no multiplying factor could be applied to them since they were not in receipt of any compensation on Dec. 31. The society's system of applying art. 35 (*g*) may have been prudent or imprudent, wise or unwise. Their directors had adopted it, and they in fact continued to follow it. They made, as I have said, a final call of £2,816 2*s*. 3*d*., relying on their own method of assessment. It seems to have been paid at some date, perhaps with interest from Feb. 28, 1930. The contrary at least is not stated. In any case, however, it seems to me that it is impossible to deduce from the documents in evidence either an agreement to vary the contract of insurance relating to the 1923 cases so far as regards Wooding and James or, which amounts to the same thing, an abandonment or waiver by the company of the right to claim indemnity from the society in respect of compensation payable in the future to those two men. Even if it were proved that the assessment on the basis shown in the letter—that is, one based on an omission of all cases in which compensation was not being paid on Dec. 31, 1927—was quite insufficient, it would not affect the above conclusion. In fact, however, there is no evidence to justify such a view. The application of the Post Office annuity tables to men on full compensation would give a generous assessment so far as regards those men, for it amounted in effect to a capitalisation on the footing of a life annuity of the liability in respect of a man who was recovering from his accident and who would soon be back at some kind of work. It may be observed that the surplus of the society as at Dec. 31, 1933, as appears from their letter to the company of Mar. 26, 1934, amounted to no less than £149,789. That sum was distributed in the form of bonuses to members, and the sum of £10,745 was actually paid by cheque by the society to the company on that day. The bonus so paid included the sum of £2,668 in respect of the ordinary accident insurance for 1922 to 1928. Incidentally, I think it cannot be suggested that the company owed large sums to the society at the end of 1933, or there would have been a set-off.

It is true that the society in a letter of Nov. 4, 1933, asserted that, since the case of Wooding was not included in a list of 1923 cases, and was not included in the 1928 final call, any future liability would have to be borne by the company. There is no evidence that this view was assented to. Moreover, in a letter from the society, dated June 19, 1934, the manager—apparently resiling from the previous contention—wrote that, since the recurrence was due to the 1923 accident, the company would be "quite in order in restoring the man to payment of compensation." A similar letter was written on Mar. 31, 1936. In the case of James, the society continued to take an interest in his case and to urge a final settlement of his claim from 1932 to Sept., 1936. It is perfectly clear that there was no agreement to release the society from risks in regard to these two men. A similar observation may be made as to the case of Hawkins.

A My Lords, I am not sure that I understand the views of GREER and MACKINNON, L.JJ., as to the facts in regard to payment of premiums by the company. The former states that the company had failed to pay the premium in respect of Wooding and James and were in default with regard to it. I think MACKINNON, L.J., takes the same view. Both B the Lords Justices appear to think that, this being so, the society was released from the risks in respect of the men. With the greatest respect, I am unable, for the reasons above stated, to agree that the company is shown to have committed any default whatsoever. They never were separate premiums payable after the five-year period in respect of C any of the men. There was a final call to be paid on Feb. 28, 1930, which was assumed to cover all the 1923 cases. There is nothing to show that it was not paid either in cash or in account, and not long afterwards —namely, after completing the accounts up to the end of 1933—we find that the society is paying a large sum to the company. Even if D the call, or some other call, was not paid, however, I do not know why the majority of the Court of Appeal should assume that the society was "off the risk."

There is, I think, no principle of law that there must be implied in a contract of insurance a provision that the right to indemnity by the E assured is conditional on his previous payment of the premiums. As a matter of commercial good sense, there is a great deal to be said for the terse phrase enunciated by counsel for the society—"no premium, no cover." It is doubtless for that reason that insurance companies usually require that the consideration for which they undertake to indemnify F the assured must be paid before the risk attaches. There is, however, no doubt that a contract of insurance may involve merely a promise by the assured or his broker to pay the premium, and this is implicitly acknowledged in such marine insurance cases as *Roberts* v. *Security Co.* (3), *Universo Insurance Co.* v. *Merchants Marine Insurance Co.* (4) and G *Bhugwandass* v. *Netherlands India Sea & Fire Insurance Co. of Batavia* (5).

In the present case, the terms of the amended articles (like the original articles) show clearly that the risk attaches before payment, and that it continues even if the member fails to pay moneys due by him to the H society in respect of a particular year within "such reasonable time as the directors may in their discretion allow," for the result of default is limited to this, that the member, "*whilst* such default continues," is not entitled to any further indemnity in respect of ordinary accidents which had occurred during that year, but he is entitled to be credited with refund or bonus (art. 35 (*m*)). Moreover, if a call is not paid on or before the day appointed for payment, the member must pay interest as provided by art. 36. It is also to be noted that the default relates, not to the moneys payable in respect of a particular workman, but to that payable in respect of all the workmen at the protected mines of the member who have suffered accidents in a particular year (art. 35 (*m*)). There is, in my opinion, no possibility, according to the terms of any of the articles, of coming to the conclusion that the society has been released from risk in respect of two or three particular workmen, and yet remains liable as regards other accidents in that year. There might, no doubt, be an agreement to that effect, but no such agreement is even suggested in the particulars of the society. I must repeat that there is no allegation by the society that there has been any default by the company in payment of a call after a reasonable time for payment has been fixed by the directors of the society.

It is no doubt true that the company was in arrears as regards calls in 1932, and an agreement was then made with the society to release it from certain further liabilities for accidents which occurred in 1930 and 1931. There remained £5,673 12*s.* 1*d.* due to the society in July, 1932, and a letter of July 21, 1932, was put in evidence containing a statement that a cheque for that amount would be sent to the society in the course of the following week. No letter by the society was put in complaining that this cheque was not sent, and, in the absence of such a letter or other evidence of non-payment, the presumption seems to me to be that the sum was paid. Further, the letter of Mar. 26, 1934, to which I have referred seems to me to afford strong evidence that any default prior to that date had been made good.

My Lords, out of respect for the Court of Appeal I have dealt, I fear, at some length with matters with which they dealt, though they were not, I think, in strictness, before an appellate tribunal, which, in such a case as the present, should only be concerned with questions of law. However that may be, my conclusion must be that at which Slesser, L.J., arrived, with which I concur. The appeals must be allowed with costs here and below. The awards must be set aside, and new awards must be made in terms which counsel have agreed.

Lord Atkin: My Lords, the facts and issues in this case have been fully set out in the opinion of my noble and learned friend Lord Wright which I have had the advantage of reading, and I can state at once my reasons for thinking that this appeal should be allowed, which, except in one small matter to which I will refer, agree with the judgment of Slesser, L.J. In all matters arising under the Workmen's Compensation Act, 1925, s. 7, two questions must be answered. (i) Does the section apply? (ii) If so, what are the rights enforceable by the workman under it? On the first question, the only issue is: Have the employers entered into a contract with any insurers in respect of any liability under the Act to any workman? On the second question, the issue is: What, under that contract, were the rights of the employers against the insurers? The two questions seem to be in risk of being confused. The section may apply, and yet under it the workman may acquire no rights against the insurers, for his employers may have none.

The first question, therefore, in this case is: Had the employers
A entered into a contract with insurers in respect of their liability under the Workmen's Compensation Act? I think this can only be answered in one way. By the contract between the indemnity society and its members evidenced by the articles, the society agreed to indemnify the member from liability for the unforeseen events of accidents for which
B the member was liable under the Workmen's Compensation Act. The essential purpose of the society as set out in its memorandum and its articles is to agree to give and to carry out such an indemnity. The society intended to be, and were, insurers, and the contract between them and their members was such a contract as is described in sect. 7.
C It was a contract with insurers, and it was also, if there be a difference, a contract of insurance. There was one contract, and I, for my part, do not accept the division into two "phases" or "periods" as having any bearing on the matter. The contract remained throughout a contract to indemnify against unforeseen events, and the fact that, for some
D events or for some periods of time, the society, as the consideration for their promise, were entitled to demand complete reimbursement of the sums they became liable to pay seems to me irrelevant. A contract does not cease to be a contract to indemnify because the contractor exacts payment, either in advance or subsequently—equal to what he has paid
E In this particular case, at the end of five years even this situation did not arise, for the society had to bear the liabilities incurred over and above the reimbursement assessed as a final call. However, this double phase does not, in my mind, prevent the whole contract from being "a contract with insurers." With the greatest respect, I dissent from the
F description given by SCRUTTON, L.J., in *Pailin* v. *Northern Employers' Mutual Indemnity Co.* (1), at p. 87, "the insurer is an indemnified agent, not an indemnifying principal," a neat antithesis which was applied by MACKINNON, L.J., to the present case. Neither in that case nor in this were the insurers agents. They paid the compensation direct to the
G workman in that case, though not in this. In the first case, however, they received reimbursement, not because they had agreed to pay compensation as agents for the assured, but because they had agreed to pay compensation under an agreement to indemnify the assured, and the reimbursement was not indemnity due to an agent, but the consideration
H for an indemnity promised to the assured. In the present case, the position is still clearer. The indemnity promise operated from the first payment of compensation made to the workman. The assured could have sued for the indemnity week by week, but for the stipulation that the indemnity was to be paid quarterly. Whether the calls were made at the beginning of the year or at the end or at intervals in the course

of the year is irrelevant, though doubtless, as a matter of bookkeeping, payments were made in account. In no circumstances, in my judgment, could the society be called "indemnified agents."

Once it is established that here there was a contract with insurers, the rights of the employers against the insurers vested in the workman, and the only question that remains is: What were the rights? They are clearly expressed in art. 35A, and amount to a right to be indemnified against the payment of any compensation. The obligation to indemnify is qualified by two provisions, arts. 12 and 35 (*m*), the substance of which seems to be that, if a member is in default as regards the payment of any money due to the society within such reasonable time as the directors may allow, he is not to be entitled to any further indemnity while such default continues. Greer and MacKinnon, L.JJ., seem to have come to the conclusion that there had been some default by the employers. MacKinnon, L.J., finds that it was in not paying a final call in 1924 under the old articles. My Lords, I should have agreed with the contention of counsel for the appellants referred to by MacKinnon, L.J.—namely, that, in the circumstances, both parties continuing their relations for years after the alleged default, the true inference in fact is that all payments in 1924 were duly made. I can find no evidence at all to the contrary, and in particular I can find no trace in the correspondence and accounts of June and July, 1928, of any suggestion that the employers were in default. In fact, it is now admitted that no call had been made by the society which had not been paid. There is no amount now due by the employers to the society. There is, therefore, no set-off available to the society, assuming that set-off would be a valid defence. It was pointed out that, when assessing final calls for 1923 in 1928, the employers had struck out the name of Wooding from the list of outstanding cases, and that that fact showed an express agreement between the employers and the society that Wooding should no longer be treated as an outstanding case. I will not refer to the facts in detail, but I am quite satisfied that in the correspondence both parties considered that they were acting under, and not in variation of, the articles, and that the omission to include Wooding's name was due to the terms of the society's own letter, which described the list as the list of accidents which were outstanding and in which compensation was being paid on Dec. 31, 1927. Wooding, who had been seriously injured, and was always at least partially incapacitated, was not being paid compensation on Dec. 31, 1927, for he had been given light work at his former full wages. This episode introduced the contention that Wooding and the other two workmen concerned were workmen, as described in art. 35 (*b*), "who had recovered and ceased to be entitled to compensation," so that, when their total or partial incapacity recurred, the recurrence was to be deemed a fresh accident. It was said that Wooding was such a case, and that everyone intended that, when he came again to receive compensation, he was to be treated as suffering a fresh accident on the date of such renewed compensation. My Lords, the answer to this is that that clause, in its plain meaning, never applied to Wooding or the other two workmen, for it is admitted that throughout they continued, as they are now, at least partially incapacitated. In other words, they had never recovered or ceased to be entitled to compensation. In the result, I think that the society are justified in saying that they are being called upon to grant an indemnity in respect of Wooding without having received a sum equivalent to an actuarial calculation of their future liability in respect of him. The answer is that they omitted to make any such assessment without any misrepresentation by the employers. What the assessment would have been in respect of a man incapacitated but receiving full wages I have no idea. It is one of the facts not discussed at the trial, and not open for discussion in an appeal on points of law only. In any case, apart from an agreed variation of the contract, which, as I have already said, must be negatived, I agree with what was said by SLESSER, L.J., that the consideration is collective, not several, and that failures to make the appropriate payments in respect of individual workmen do not defeat the obligation to indemnify unless they amount to defaults within the meaning of the articles. I am not prepared to accept the view expressed by SLESSER, L.J., that we have only to consider the contract between the society and the employers evidenced by the original articles. I think that, to the extent that that is relevant in this case, the contract could be, and was, varied by the amended articles. Subject to this, as I have said, I agree with his opinion. The cases of the other two men follow what has been said in the case of Wooding. The appeals should be allowed with costs here and below, and the cases remitted to the county court judge for him to make an award of compensation in the cases of Wooding and James and a declaration of liability in the case of Hawkins.

LORD RUSSELL OF KILLOWEN: My Lords, I concur in the proposed motion.

LORD WRIGHT: My Lords, the appellants are workmen who, while employed by the Ebbw Vale Steel, Iron and Coal Co., Ltd., in their collieries as underground miners, sustained injuries by accident arising out of and in the course of their employment, and became entitled to claim compensation or a declaration of liability from their employers. In Oct., 1936, possession of the Ebbw Vale company's undertaking and assets was taken by a receiver who was appointed for debenture holders. Thereupon, under the Workmen's Compensation Act, 1925, s. 7, the appellants claimed that the rights of the Ebbw Vale company as employers against the respondents, a mutual indemnity society formed for the object of covering employers against the risk of liability to pay compensation under the Acts, the Ebbw Vale company being protected members of the society, were transferred to and vested in the appellants severally, so far as concerned the employers' liability to compensate them. Sect. 7 provides that, upon such transfer, the miners should have the same rights and remedies, and be subject to the same liabilities, as if they were the employers, so, however, that the insurers should not be under any greater liability to the workmen than they would have been under to the employer. Hence it was material in this case to determine whether sect. 7 applied. That inquiry envolved two questions—namely, (i) whether or not there was a contract with insurers within the section, and, if so, (ii) whether or not the respondents would have had a defence or set-off or other answer against the Ebbw Vale company. The appellants' claims against the respondents went to arbitration before the county court judge at Cardiff, who dismissed the claims on the ground that there was no contract of insurance between the respondents and the Ebbw Vale company, and he also held that, if there was, it was determined by the appointment of the receiver. On appeal, the members of the Court of Appeal were divided. Greer and MacKinnon, L.JJ., were for dismissing the appeal. They held that, if there was a promise to indemnify, which they negatived or questioned on the facts of the case, it was conditional on payment of a certain consideration which was never made, and hence the obligation under the contract never arose. Slesser, L.J., dissented, and was of opinion that, at the date of the receivership, there was a contract with insurers, or of insurance, subsisting between the respondents and the Ebbw Vale company under which the claims of the appellants against the Ebbw Vale company were covered, and that the respondents had not shown any defence or set-off or other reason why those claims should not, having vested in the appellants under sect. 7 of the Act, succeed. Before your Lordships, the arguments have covered a large field. The case is no doubt one of some difficulty and complexity, but the difficulties of the case have been increased because many points which have been raised were not formulated in the pleadings or dealt with by specific findings of fact by the county court judge. Several of the issues debated have been abandoned or seen to be irrelevant, and I do not discuss them further in this opinion. On consideration of the whole case, however, I find myself in substantial agreement with the careful judgment delivered by Slesser, L.J., and am of opinion that the claims should succeed.

On the issue whether the appellants had good claims against the Ebbw Vale company, there is no dispute. It is necessary, however, to summarise the history of these accidents and claims in respect of them in order later to understand how they were dealt with between the respondents and the Ebbw Vale company. Wooding was injured on Aug. 24, 1923, and became entitled to 35*s.* per week during such period or periods as he should be totally incapacitated by reason of the accident. He was totally incapacitated, and was paid the appropriate compensation until early in Jan., 1928. The precise date is immaterial, because the appeal has proceeded on the assumption, the materiality of which will appear later, that he was not receiving compensation on Dec. 31, 1927. Between then and Mar., 1936, he did light work, and was paid the same wages as before the accident, except during certain intermittent periods of complete incapacity. From that date, he became finally subject to total incapacity from the effects of the accident. He has been paid no compensation since Dec. 29, 1936, though it is agreed that he is entitled to 35*s.* per week compensation as against his employers.

As to the appellant James, he sustained injury by accident arising out of and in the course of his employment on Apr. 27, 1923, and became entitled to 35*s.* per week during such period or periods as he was thereby totally incapacitated. He was totally incapacitated until Mar. 8, 1926, from which date until Apr. 2, 1932, he was able to do light work and was paid wages equal to those he earned before the accident. He ceased work on Apr. 2, 1932, and from that date he received 8*s.* 4*d.* per week by way of compensation until Dec. 29, 1936. Since then, he has received no compensation, though it is agreed that he has been all the time thereafter partially incapacitated as the result of the accident, and is entitled to compensation at the rate of 22*s.* 6*d.* per week as against his employers.

As to the appellant Hawkins, on Apr. 15, 1929, he was injured by an accident arising out of and in the course of his employment, and became entitled to 23*s.* 10*d.* per week during such time as he should be totally incapacitated as the result of the accident. He was totally incapacitated until Mar. 26, 1933, when he returned to light work and received, and is receiving, wages equal to those he earned before the accident. It is agreed that he is entitled to a declaration of liability as against his employers. In all these cases, it has been agreed between the parties that at no material time since the accident has any of the appellants ceased to be incapacitated.

While the claim of each of the men against the Ebbw Vale company is not in dispute, the respondents deny that any one of the appellants has any claim against them. Their case is that they are not under any liability to the Ebbw Vale company, and they rely on the words of sect. 7 that the insurers shall not be under any greater liability to the workman than they would have been to the employer because there are vested in the workman only such rights (if any) as the employers had against the respondents, assuming that the respondents were insurers. The respondents deny that they were insurers within the meaning of the section, and, alternatively, if they were insurers, they set up against the appellants various answers which they say they had to any claim made against them by the Ebbw Vale company in respect of these particular accidents. There can be no question that the appellants must fail in whole or in part if the Ebbw Vale company could not have successfully claimed an indemnity in whole or in part against the respondents as insurers in respect of these accidents. The section says in clear terms that the insurers shall have the same rights and remedies, and be subject

to the same liabilities, as if they were the employer, and that their rights and liabilities are no greater and no less. It is accordingly necessary to ascertain the position between the Ebbw Vale company and the respondents. For that purpose, the terms of the contract between them must be examined, and then it must be considered, so far as the evidence permits, what was done under the contract in respect of these particular A
claims. I shall at first assume that the contract was a contract with insurers within the meaning of the section.

The contract between the Ebbw Vale company and the respondents was constituted by the fact of their becoming members of the respondent society, but the terms and conditions of that contract are to be found B
in the memorandum and the articles of association of the society. The society is a mutual society making calls on the members in order to provide funds to meet the liability. The provisions of the articles are necessarily of some complexity, but, on the whole, are carefully thought out and clearly expressed. Certain of the articles are peculiarly material. C
I shall attempt to summarise as briefly as possible the effect of these provisions. There is, however, a complication, in that the articles were twice changed between 1923 and 1936. The amended articles (as I shall call them) were passed by a special resolution of the society convened on Apr. 12, 1927. Counsel for the appellants is content to rest his case, D
for purposes of this appeal, on the amended articles. These are similarly accepted by counsel for the respondents. I question if there is any difference material to this appeal in the articles, but, in order to seek to explain the course of events, it will be necessary to begin with the original articles. There was a third change, which was effected by special E
resolution in Dec., 1932. This was more drastic, and no doubt was influenced by anticipation of the passing of the Workmen's Compensation (Coal Mines) Act, 1934. This Act, however, is not here material, because it applied only to men employed after the Act came into force. It imposed compulsory insurance on employers in respect of compensation F
for their workmen. It is common ground that these 1932 articles do not really affect the questions raised in these appeals. In effect, what were called transitional provisions preserved the earlier articles in their application to the accidents in question.

The original articles made it obligatory for any member (who had to G
fulfil the specified qualifications of owning, or working, or being interested in, a coal mine) to furnish to the society particulars of all underground workers employed in the mine for entry in the register. The most important of the articles for the purposes of these appeals is art. 35 (I am still dealing with the original articles), which is headed mutual insurance H
against "ordinary accidents." The accidents here in question were "ordinary" accidents as defined in the articles. There was a separate class of "extraordinary accidents," by which term was meant casualties of a more serious character involving death or injury to three or more men. There was a special account for such accidents, but that account

may be disregarded for the purposes of these appeals. Art. 35 (*a*) (1) provided that the society was to indemnify the member against the payment of any compensation, *inter alia*, under the Workmen's Compensation Acts. The society was given full control of investigating arbitrations and admission of liability in respect of any such accidents. This right is a usual concomitant of insurance contracts. Indemnity moneys payable by the society to a member were to be paid monthly or quarterly, or otherwise as the society might determine. The society is a mutual indemnity society, and the contributions of the members, which constituted the consideration for the benefits they received, were obtained by means of "calls." Certain classes of such calls were distinguished. A separate account was kept in respect of the accidents occurring in each year. This was necessary because the liability of an employer under the Workmen's Compensation Act, 1925, accrues once and for all when the accident occurs, though it may be many years before the liability is discharged by means of the weekly payments provided for by the Act, or their commutation. So it was decided by this House in *Daff* v. *Midland Colliery Owners' Mutual Indemnity Co.* (6), and, indeed, it follows from the nature of the liability to pay compensation under the Act. Hence art. 35 proceeded on the footing of accounts in respect of each protected member for each particular year. The article made special provision in respect of any ordinary accident for a period of 18 months after the beginning of the year in which the accident occurred. During that period, "provisional calls" were to be made, of which one or more should be made before the end of the year of such amount as would be sufficient to indemnify the member in respect of compensation payable by him in respect of accidents occurring in that year. The sums obtained by the calls were to be paid into a fund called the society's "ordinary accident account" to be kept in respect of that year. The sums so paid by each member were to be credited to him, and he was to be debited with the amounts paid by the society in order to indemnify the member, together with a due proportion of administration expenses. I disregard a provision for reinsurance, which was not acted upon during the relevant period by the society. The account might show a credit in favour of the member or a debit against him. At the end of the period of 18 months, an actuarial estimate was to be made of the amount of compensation still payable by any member in respect of each workman in his employment injured in the particular year, and a "call," entitled the permanent fund call, was then to be made on the member, and was to be of an amount equivalent to the amount of the assessment. The ordinary accident account of the member was to be struck. He was to be credited or debited with any balance resulting. In this way, the "permanent accident fund" of the society was maintained, and was available for payment by the society of moneys due in respect of the outstanding liabilities. These might eventually turn out to be greater or less than the amounts assessed. Finally, after the end of five years from the beginning of each particular year, there was to be a further actuarial assessment of the society's outstanding liabilities in respect of the ordinary accidents of that year. If the assessment exceeded the amount of the fund, proportionate "adjusting" calls were to be made to replenish the deficiency. If the fund exceeded the assessment, provision was made for refunds. In either event, administration expenses were brought in to account. There was also provision for a bonus distribution if the directors thought the permanent accident fund was excessive in amount. The ordinary accident fund for each year and the permanent accident fund were to be kept separate. There was thus a clear distinction between the two funds. The ordinary accident fund was a fund kept in respect of the member. The payments under it were in theory to be recouped by the calls on him. It was wound up for the particular year when it was superseded by the permanent accident fund which was part of the general assets of the society.

I turn to the amended articles of Apr., 1927. For present purposes, the most notable change was the change in regard to the period during which provisional calls were made, which was altered from one-and-a-half years to five years. It may be that it had been found that 18 months from the commencement of the year in which the accident took place was too short to ascertain the extent of the liability resulting from that accident or to obtain a satisfactory actuarial assessment of the outstanding liabilities of the year for the purpose of making the final call and constituting the permanent accident fund for that year. Under the amended articles, there was to be only one actuarial estimate, as contrasted with the two assessments under the original articles, one at the end of one-and-a-half years and the other at the end of five years. The procedure provided by the original articles, however, was, *mutatis mutandis*, to be in general still followed. Certain other articles may be referred to. There were default clauses in the original and amended articles. In the latter, these were art. 12 and art. 35 (*m*). By these, it was provided that, if a protected member should fail to pay moneys payable by him to the society in respect of any particular year within a reasonable time to be fixed by the directors, he should not be entitled to any further indemnity in respect of ordinary accidents occurring during that year, save in so far as his account in respect of that year was sufficient. It is conceded that the Ebbw Vale company were not in default under these clauses, which, accordingly, as regards them, did not come into effect. A good deal of argument was directed to art. 35 (*b*), which was a new clause introduced into the amended articles. That clause provided as follows:

> . . . where a workman wholly or partially incapacitated by an accident in the ordinary sense [as contrasted with disease] recovers and ceases to be entitled to compensation and such total or partial incapacity recurs so as to entitle him to compensation without his being involved in any fresh accident, such recurrence shall be deemed a fresh accident occurring when the recurrence takes place.

As has already been pointed out, it is agreed in these appeals that at no time had any of the appellants ceased to be incapacitated. It follows that they cannot have recovered. I think the clause is referring to a type of case which is very common, in which the workman has recovered in the sense that he can go into the labour market and obtain employment as a sound workman, but there remains some latent weakness consequent on the accident, which breaks down and again incapacitates him. This is still a result of the original accident. For obvious reasons, this is to be treated under the amended articles as a fresh accident, which is deemed to take place at the time of recurrence. The position of the appellants was quite different. They never recovered, but at certain periods ceased to be entitled to compensation, because, according to a common practice, they were employed at light work at full wages, and hence could not claim compensation for loss of earnings, though they would have been entitled to a declaration of liability so as to come on compensation if the light work was no longer available, either because they broke down completely or for some other reason, or were not remunerated at full wages.

Before I state my opinion on the case as a whole, I must summarise what happened as between the Ebbw Vale company and the respondents, at least so far as the evidence enables this to be done, in respect of the claims in question. Both Wooding and James sustained their accidents in 1923. The 18-months' period fixed by the original articles thus expired in June, 1924, and the actuarial assessment should then have been made, and the calls for the permanent accident fund declared by the directors and paid by the member. On May 19, 1928, the respondents wrote to the Ebbw Vale company enclosing a valuation of outstanding cases on hand on Dec. 31, 1927, and showing the actuarial assessment in respect of them as on that date. On that date, the five-years' period would have expired. Wooding was entered on that list and assessed at £1,221. James does not appear. A revised valuation was drawn up omitting Wooding and some others. This formed the basis of a final call for £9,223 made on the Ebbw Vale company, which was the sum as reduced from the original valuation of £13,139 by reason of Wooding's name and other names being omitted. At that date, Wooding was not receiving compensation. It is said that Wooding's name was struck out because the first valuation was meant to include only cases in which the men were receiving compensation, and that the Ebbw Vale company were asked to confirm the valuation on that basis. Whatever the reason, it is clear at least that the striking out of Wooding's name was deliberate, not accidental, and the final call was thus deliberately fixed, excluding Wooding and not including James. It is possible that in June, 1924, the assessment required by the original articles at that date had actually been made. It may have been for that reason that in 1928 Wooding's name was struck out. It is not, indeed, easy to see how, in 1924, the change in the articles should have been foreseen, and why the respondents should not have done then what the articles required—namely, make an assessment at the end of one-and-a-half years, which period expired in June, 1924. Thus the revised valuation may have simply corrected a mistake. The point is of some importance, because the majority of the Court of Appeal as one of the grounds of their decision held that there was no cover in respect of Wooding because the "premium" had not been paid. There are, in my opinion, many answers to this way of looking at it. This was a collective insurance covering all the Ebbw Vale company's men in 1923. The respondents were a mutual company, and the consideration proceeding to them from the Ebbw Vale company was not a specific premium, payable at a fixed or ascertainable date. It took the form of a call made by the directors under the articles from time to time. It was for the respondents to determine the amount of the call. They did so, fixing it at £9,223, in the exercise of their discretion. There is no suggestion that they were misled by the Ebbw Vale company. The respondents must have known all the facts. The company paid all that was demanded from them by way of calls, and, as is admitted, were not in default. I cannot find any justification for the conclusion that they were deprived of their right to be covered in respect of Wooding, because, if such was the fact, the respondents had made no final call in respect of him. The fact, however, is not made out. Probabilities rather point the other way. There is no finding on the point. Counsel for the respondents sought by an elaborate examination of certain accounts to show that the final call in respect of the Wooding accident was never paid. The accounts produced, however, are incomplete, and, even if complete, would have needed explanation by an accountant. This argument, for what it was worth, failed. In any case, the default clauses which I have quoted terminate liability on the part of the insurers only in the very limited way therein provided, and would not affect the liabilities in question. Apart from express agreement, there is no general rule of law in insurance contracts that there is no cover unless the premium is paid.

Nor do the later documents which have been produced afford any more decisive arguments against Wooding's claim. It seems from certain documents, which I do not profess to understand, the evidence in respect of them being insufficient or non-existent, that Wooding's claim was "transferred from 1923 to 1928," and later from "1923 to 1930." Whether the Ebbw Vale company knew of, or agreed to, such transfers, which seem to have been recorded in some way by the respondents, does not appear. I cannot give any effect to these entries. There is no finding about them by the judge. In any event, if, as it is said was the case, the transfers were under art. 35 (*b*), which I have discussed above, that clause, for reasons I need not repeat, could not apply to this case. The Ebbw Vale company were later in some financial difficulties, and were in arrears with the payment of calls. These calls, however, had no reference to Wooding's claim, and the matter was settled by a compromise arrangement, under which the Ebbw Vale company, in consideration of being released from the arrears, agreed to give up any claims in respect of 1930 and 1931 accidents. Subsequent letters, the latest of which is dated July 7, 1937, show that the respondents were still interesting themselves in Wooding's claim, though I do not find any express admission of liability, any more than I find any express repudiation.

Much the same applies to James's claim, which is even simpler. In 1934, 1935, and 1936, the respondents appear to have been pressing the Ebbw Vale company to negotiate a commuted settlement of the case, as if it were a liability which concerned them.

Hawkins' case was different in some respects. The accident, which occurred in Apr., 1929, fell under the amended articles. The five-year period thus expired on Dec. 31, 1933. In the assessment of outstanding liability in respect of the Ebbw Vale company's men as on that date, the name of Hawkins does not appear. At that date, he was not in fact receiving compensation, because, though partially incapacitated, he was receiving for light work as a doorkeeper the same wages as he received before the accident. This had been his position since Mar., 1933. Up to that latter date, he must have been paid compensation, and presumably provisional calls were made which included indemnity in respect of these payments. Whether any final call included an assessment in respect of Hawkins I do not know. Perhaps not. If not, however, then, as in the other cases, there could not be a default on the part of the Ebbw Vale company in paying any sum which was not the subject of, or included in, any call. It would seem, however, that a final "adjusting call" was made on the Ebbw Vale company in respect of their 1929 accidents, which would seem *prima facie* to close the account. In the case of Hawkins, also, the letter from the respondents to the Ebbw Vale company, enclosing their statement of 1929 accidents and asking confirmation from the company, referred to the particular items included as "outstanding and on which compensation was being paid on Dec. 31, 1933."

Subject to the question whether there was a contract with insurers within the section, which I shall discuss later, the general position, in my opinion, stands thus. The Ebbw Vale company had entered, as I for the moment assume, into a contract with insurers—namely, the respondents—in respect of their liability to the appellants, *inter alios*, under the Act. The employers' undertaking had been taken possession of by a receiver. The rights of the Ebbw Vale company against the respondents under that contract, so far as concerned the appellants, were thereupon transferred to, and vested in, the appellants severally. It is true that the respondents were to have the same rights and remedies against the appellants as if they were the employers, but the onus is upon the respondents to show some ground why the appellants were not covered by the contract, or some other ground of defence or cross-

claim. Thus, they might have shown that the contract had been varied,
or, indeed, determined, or that they had some other defence, or that
they had some cross-claim or set off which could have been raised on
the facts if a claim had been brought by the Ebbw Vale company in
respect of these accidents. This, in my opinion, they have failed to do.
It follows, so far, that the claims should succeed. The formula "no A
premium, no cover," is neither generally sound in law nor as applied to
this insurance contract, and, if it were, the facts would not support it
here.

However, I have up to now assumed something which was at least
questioned by GREER, L.J., and was negatived by MACKINNON, L.J., B
in addition to what seems to have been the main ground of their
decision—namely, that no "premium" had been paid. I have assumed
so far in this opinion that there was a contract of insurance, or, in the
words of the section, a "contract with insurers." However,
MACKINNON, L.J., did not accept that this was so, so far as was relevant C
for purposes of these appeals. He said that, under the system followed
by the respondents, there were two periods. In the first period—that
is, the period of 18 months under the original articles, and five years
under the amended articles—the society were to be what, adopting the
expressions used by SCRUTTON, L.J., in *Pailin's* case (1), he calls in the D
first period indemnified agents, and, in the second, indemnifying insurers.
The second period, he held, only began when the Ebbw Vale company
paid the final call, which was in effect the premium in consideration of
which the society passed from the status of indemnified agents to that
of indemnifying insurers. There was, he held, no evidence that this E
event happened. On the contrary, he held on the evidence that it never
did. Hence, so far as concerned this case, there never was a contract
with insurers. Things never passed into the stage where there was
such a contract.

I think this view is erroneous, both because, on the facts, the contract F
in respect of each man had passed into the second period, and on the
law. The reasoning of MACKINNON, L.J., was based on the view that,
in the first period, the society merely paid the claims out of moneys
which they recovered from the employers. No doubt they indemnified
the employers, but they were directly and completely indemnified by G
the employers. Hence it was said that they paid as the employers'
agents, and were in turn indemnified by the employer. As an authority
for this view, MACKINNON, L.J., relied on *Pailin* v. *Northern Employers' Mutual Indemnity Co.* (1). In that case, the system of mutual indemnity
as regards what were called "ordinary accidents" was limited to a H
system analogous to the system adopted by the respondents in what has
been called the first period. The Court of Appeal in *Pailin's* case (1)
held that there was an insurance contract as regards extraordinary
accidents where the system followed was similar to that adopted by
the respondents in the second period, but that in the first period the

society was not indemnifying against loss, but paying on behalf of the employer a sum for which he is entitled to be indemnified by the employer (see SCRUTTON, L.J., at p. 87). I do not think it necessary to express any final view on this matter, though, as at present advised, I think that the decision involves what may be said to be too narrow a view of the words of sect. 7 of the Act, " a contract with insurers." I think that the contract was a contract to indemnify the employer for an agreed consideration. Insurance, in practice, especially mutual insurance, in which the losses of the members are only paid out of the members' contributions, may take many forms. Thus, we may have, for instance, single premium policies, endowment policies, and many other types, all of which are generally described as insurances. I think that sect. 7 should be construed as widely as can fairly be done, since it is a section of an Act which is remedial in character, and there are obvious reasons for holding that in *Pailin's* case (1) the relevant contract was a contract with insurers. The contract in the present case, however, appears to me to be so different in character that *Pailin's* case (1) is no authority on the point. MACKINNON, L.J., artificially splits up the contract, so far as concerns ordinary accidents, into two parts, so that in the first period the same accident is not covered by an insurance contract, while in the second it is. I find myself, with deference, unable to concur in this opinion. I think that there was only one contract in regard to these accidents, and that it had the single uniform character of a contract of insurance, not only in the second period, as MACKINNON, L.J., following the analogy of what SCRUTTON, L.J., held in *Pailin's* case (1) in respect of extraordinary accidents, accepts, but from beginning to end. It would be in respect of the same accident a curious result if there were two contracts embodied in the articles, differing so fundamentally in character. The contract seems to me to be a single whole of cohering parts. In the first place, an accident falling within the contract creates *co-instanti* a single liability, which may not be discharged except by a number of payments and after a considerable lapse of time. A machinery is set up in the articles with the object of giving a single complete indemnity to the employer. The society is a mutual indemnity society, so that the funds are derived from the contributions of the members. This object is effected in the first period by the provisional calls, which are based on each member's own liability for accidents. All the provisional calls are made (apart from administration expenses) to recoup in this period actual payments of compensation. The system might have been adopted of apportioning the totality of payments *pro rata* among the different members, instead of making calls on each to the extent of his demands on the fund. In effect, in this way, an employer is his own insurer in the first period, but it is not uncommon in contracts of insurance for the assured to bear a certain first proportion of the losses. In the present case, this system has been adopted in regard to a special period of the contract. In the second period, no one can dispute that, if the aleatory element, the element of uncertainty or risk assumed by the insurer, is an essential feature of insurance, that element was present in the second period. In consideration of the final call in respect of the particular year, the society assumes the whole outstanding liability of the member in respect of that year. The call is based on an actuarial estimate, which may in the result turn out to be either too little or too much. The society only assumes liability to pay out of its general funds. I cannot dissect the contract into two periods, or split the transaction into two disparate bargains. As part is insurance, I think the whole must be, and, in any event, to my mind, is, insurance. I cannot agree with MacKinnon, L.J., in regard to this matter.

I have, I think, dealt with all the points raised in the case so far as they appear to me to call for detailed examination. It was indeed also argued that the contract had been varied so as to exclude the three appellants from the cover, because, it was said, they were not included in the assessment. It became clear, however, that this argument was untenable, and I think it was expressly abandoned. The society throughout was proceeding according to the conditions of the articles. A vague suggestion of estoppel, not clearly defined, also failed. It was not contended before this House that the contract was determined by the receivership. That point was very properly not advanced before this House, and was obviously untenable. In my opinion, the appeals should be allowed, and the cases remitted to the county court to make awards allowing the claims.

Lord Romer: My Lords, the three appellants Wooding, James, and Hawkins in 1923, 1923, and 1929, respectively, and while in the employment of the Ebbw Vale Steel, Iron and Coal Co., Ltd., sustained personal injury from accidents which admittedly arose out of and in the course of their employment. Each of them since the date of his accident has been, and still is, totally or partially incapacitated.

On Oct. 21, 1936, a receiver of the assets and business of the company was duly appointed on behalf of debenture holders having a floating charge thereon, and the appellants Wooding and James now claim to be paid by the respondents the compensation accruing due to them since Dec. 29, 1936, that being the last date on which either of them received compensation from the company. The appellant Hawkins, who on Mar. 26, 1933, returned to light work, and has been in receipt ever since of his pre-accident wages, merely claims against the respondents a declaration of liability. These claims are made in pursuance of the provisions of the Workmen's Compensation Act, 1925, s. 7. The meaning and effect of this section are plain enough. If, under the contract admittedly subsisting between the respondents and the company, the respondents could, on Oct. 21, 1936, be properly regarded as insurers of the company's liability to pay compensation to an appellant, the rights of the company against the respondents under the contract in regard to that liability were upon that date transferred to, and became vested in, such appellant, for it is not now contended by the respondents that the contract between them and the company was determined by the appointment of the receiver. The first question, therefore, to be determined upon this appeal is whether the respondents were such insurers upon the date in question. If this question be answered in the affirmative, the further and quite distinct question will arise whether the company at that date had any rights under the contract in relation to its obligations to pay compensation to the appellants, for the appellants can have no greater or better claims against the respondents than the company itself had at the time the receiver was appointed. My Lords, for the purpose of considering these questions, counsel for the appellants was content to treat the contract between the company and the respondents as being regulated, after Dec. 31, 1927, by the terms of the respondents' amended articles of association, and the arguments before your Lordships' House proceeded throughout upon this basis. It is, therefore, upon this basis that I propose to deal with the case.

It is unnecessary for me to consider in detail the relevant provisions of those articles. That has already been done by my noble and learned friend LORD WRIGHT. Looking at those provisions, however, I cannot for a moment doubt that, after the expiration of five years from the beginning of any particular year, the respondents were truly insurers in respect of the company's liability to compensate any workman who was incapacitated by an ordinary accident which happened, or, under art. 35 (*b*), must be deemed to have happened, in that particular year. Whether or not the same can be said in respect of the company's liability to compensate during the five years is a question upon which I do not find it necessary to express an opinion. If and when that question arises, it may be necessary to consider whether *Pailin* v. *Northern Employers' Mutual Indemnity Co.* (1) was rightly decided. It does not arise now, for I am satisfied that, in the case of the appellants Wooding and James, the five years in question ended on Dec. 31, 1927, and that, in the case of the appellant Hawkins, it ended on Dec. 31, 1933. My reasons for coming to these conclusions can be stated quite shortly.

The company was admittedly entered in the register of protected mines and works as protected against "ordinary accidents" under art. 35. In the case of each of the appellants, the accident which happened to him was admittedly an "ordinary accident" within the meaning of the articles. The respondents, therefore, were, according to the plain terms of art. 35 (*a*), bound to indemnify the company against any compensation payable by the company under the Workmen's Compensation Acts in respect of the injuries resulting to the appellants from such accidents. During the first five years dating from the beginning of the year in which the accident happened, all sums paid by the respondents to the company in respect of such indemnity came, in the end, out of the company's own funds. After the expiration of that period, however, the liability of the respondents under their agreement to indemnify was in no way limited to, or measured by, the calls made upon the company. From that time, the respondents were without question "insurers" of the company, whatever may be said about their position before then.

It is said by the respondents, however, that, at the date of the receiver's appointment, the five years had not elapsed in the case of any one of the appellants. This contention is based upon art. 35 (*b*) of the amended articles in its relation to the following facts. The appellant Wooding ceased to be totally incapacitated at some time during 1927, and returned to light work with the company, though still partially incapacitated. He succeeded in carrying out such light work, except for certain periods of total incapacity, until Mar., 1936, when he became finally totally incapacitated from the effects of his accident While engaged in such light work, he received wages equal to those received by him before the accident, and, accordingly, was paid no compensation. The appellant James in Nov., 1928, returned to light work with the company, though still partially incapacitated, and succeeded in carrying it on until Apr., 1932. While so employed, he received his pre-accident wages, and, therefore, no compensation. He ceased work in Apr., 1932, and from then until after the appointment of the receiver he received compensation on the footing of partial incapacity. The appellant Hawkins returned to light work with the company on Mar. 26, 1933, though still partially incapacitated, and since that date has been receiving his pre-accident wages, and, therefore, no compensation. In these circumstances, the respondents contend that the accident to Wooding must be deemed to have taken place in Mar., 1936, that the accident to James in Apr., 1932, and that it must be deemed in the case of Hawkins, apparently, that no accident has happened to him at all. It is said that all three recovered and ceased to be entitled to compensation within the meaning of art. 35 (*b*) on the dates when they respectively returned to light work and began to receive their pre-accident wages. I do not so construe the article. It is admitted that no one of the three has ever ceased to be incapacitated, and how it can be said, in those circumstances, that any of them has recovered I am at a loss to conceive. It is true that the recovery contemplated by the subsection cannot be a complete recovery, for the subsection goes on to provide for the event of a recurrence of total or partial incapacity, but it is plain that the recovery must be such that all incapacity has temporarily ceased, and only a latent incapacity is left. There could not otherwise be a "recurrence" of the total or partial incapacity. In such a case, the workman ceases to be entitled to compensation in the sense that compensation ceases to be presently payable to him, and the words "ceases to be entitled to compensation" must, I think, be used in the subsection in that sense. All the appellants, therefore, ceased to be entitled to compensation within the meaning of the

subsection when they began to be paid their pre-accident wages. They have never recovered, however, and recovery is one of the conditions necessary to bring the subsection into operation. It is, indeed, to be observed that, upon the construction of the word "recovers" for which the respondents contend, the words "recovers and" are mere surplusage,
A and might just as well have been omitted altogether.

Down to this point, therefore, it would seem that the appellants' claims against the respondents are well-founded, and down to this point I do not think that I find myself in any material disagreement with the Court of Appeal. However, it was held in that court by GREER and
B MACKINNON, L.JJ. (SLESSER, L.J., dissenting), that the claims of the appellants failed, on the ground that the company ceased to be insured after Dec. 31, 1927, in respect of the compensation payable to Wooding and James, and after Dec. 31, 1933, in respect of any compensation that might become payable to Hawkins. It was said that the Company in
C each case failed to pay the "final call" under art. 35 (*h*) in respect of the particular workman, or, in the words of GREER and MACKINNON, L.JJ., failed to pay "the premium" due under the articles for the respondents' agreement of indemnity. For the purpose of considering this question, it will be sufficient to take the case of Wooding.
D If his claim be well-founded, the other appellants are admittedly entitled to succeed.

The contention that the company made default in respect of Wooding is based upon the fact that, in estimating under art. 35 (*g*) the amount of the outstanding liability of the company on Dec. 31, 1927, in respect
E of ordinary accidents occuring in 1923, and in making under art. 35 (*h*) the final call upon the company in respect of that year, the society omitted to include any sum in respect of the liability to pay compensation to Wooding. It is, I think, reasonably clear that this was due to a misconstruction on the part of the respondents of art. 35 (*b*). They seem
F to have thought, inasmuch as Wooding's name had been struck out of the statement sent to it by the respondents with the letter of May 19, 1928, that Wooding had recovered by Dec. 31, 1927, within the meaning of the article. However, the company paid in cash or in account the final call made under art. 35 (*h*), and thus completely discharged their
G obligations to the respondents in respect of ordinary accidents occuring in 1923. It was for the respondents, and not for the company, to estimate the amount of the final call in respect of those accidents, and the company, having paid that call, cannot be regarded as being in default in relation to Wooding. As was truly said by SLESSER, L.J., the con-
H sideration to be paid by the company for the insurance was not several, as regards each individual workman, but collective. Nor can any blame be properly attributed to the company for striking Wooding's name out of the statement sent to them on May 19, 1928, for they did no more than they had been asked to do by the respondents. Had they omitted to remove Wooding's name, they would have been representing to the

respondents that Wooding was in receipt of compensation on Dec. 31, 1927, and that representation would have been untrue. The respondents wished to have an accurate list of the men who had sustained accidents in 1923 and who were, on Dec. 31, 1927, still in receipt of compensation, and this they admittedly obtained. If, therefore, the respondents, in estimating as on Dec. 31, 1927, the outstanding liability of the company in respect of the ordinary accidents which occurred during 1923, estimated that liability at too low a figure by reason of their failure to take into consideration any liability in respect of Wooding, they have only themselves to blame. At the expiration of five years from the first day of 1923, the only obligation of the company in respect of accidents occurring during that year was to pay the final call made by the respondents under art. 35 (*h*). The fact, if fact it be, that the amount of that final call was fixed by the respondents at too low a figure cannot, in the absence of fraud on the company's part—and no such fraud is suggested—affect in any way the company's position. However, I am by no means convinced that the final call would have been fixed at any higher figure even if the respondents had placed the proper construction on art. 35 (*b*). As was pointed out in the letter of May 19, 1938, the outstanding liability was valued, in cases where full compensation was being paid, upon the assumption that such compensation would continue to be paid during the rest of the workman's life. The possibility of the workman recovering from his disability in whole or in part was disregarded. In these circumstances, the respondents might well be justified, when estimating the total outstanding liability in respect of all the 1923 accidents, in attributing no figures to a case where no compensation at all was being paid. It would no doubt be a rough-and-ready way of arriving at the total liability, but the respondents in assessing it were at liberty to adopt any method of calculation which they thought fit. However this may be, it would not in any case be correct to say that the company made default in payment of the " premium " for the indemnity against its liability to Wooding. In paying the final call, the company paid the proper " premium " that was payable under the amended articles in respect of all the accidents that happened in 1923 collectively, including, therefore, the accident that happened to Wooding.

My Lords, it only remains to deal with the contention on the part of the respondents that the company and the respondents in or about May, 1928, agreed that the contract subsisting between them should be modified or amended in some way which was never very clearly defined during the arguments of the respondents' counsel, but which would, I gather, have made the contract operate as though art. 35 (*b*) bore the construction that the respondents have sought to place upon it. I need only say as to this contention that I can find no evidence, oral or documentary, which even faintly suggests that the two parties made any such agreements, either expressly or by implication, or that either of them ever had any wish so to do. In my opinion, the appeal should be allowed and an order made in the terms which have been stated by my noble and learned friends.

Appeal allowed with costs. Cases remitted to county court to make awards of compensation.

Solicitors: *Smith, Rundell, Dods & Bockett,* agents for *T. S. Edwards & Son,* Newport, Mon. (for the appellants); *Slaughter & May* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

PORTAVON CINEMA CO., LTD. *v.* PRICE AND CENTURY INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Branson, J.), **November 28, 29, 30, 1939.**]

Insurance—Fire insurance—Double insurance clause—Insurance of premises by lessor and lessee—Equitable interest—Ratification of insurance—Reinstatement of premises—Fires Prevention (Metropolis) Act, 1774 (*c.* 78), *s.* 83.

The plaintiffs, who were the lessees of a cinema, insured the premises with the first defendant and other underwriters under a Lloyd's policy of insurance against loss by fire. The lessors were desirous of raising a loan on the security of the cinema, and for this purpose, and, as a condition of the granting of the loan, took out a policy of insurance with the second defendants. Cl. 4 of the Lloyd's policy was as follows: "This insurance does not cover any loss or damage or liability which at the time of the happening of such loss or damage or liability is insured by or would, but for the existence of this policy, be insured by any other policy or policies except in respect of any excess beyond the amount which would have been payable under such policy or policies had this insurance not been effected." The premises were later destroyed by fire at a time when both policies of insurance were in existence, and upon the plaintiffs making a claim under the Lloyd's policy, it was contended that the second defendants' policy was an insurance insuring the loss or damage or liability insured by the Lloyd's policy, and that it was, therefore, a case of double insurance and came under cl. 4 of that policy:—

HELD: (i) cl. 4 should be applied only to cases which are strictly cases of double insurance.

(ii) the taking out of the second policy created no equity in favour of the plaintiffs, there being no intention in the minds of the lessors to give the plaintiffs any interest in the policy moneys.

(iii) the second policy had not been taken out by the authority of the plaintiffs, nor had there been any subsequent ratification by the plaintiffs.

(iv) the Fires Prevention (Metropolis) Act, 1774, s. 83, did not have the effect of making a lessee or other person having an interest in premises an insured person, but gave to such a person, although he was not the insured, a statutory right to direct the insurers to apply the policy moneys in reinstatement of the property.

(v) in the result, no double insurance had been created.

[**EDITORIAL NOTE.** Generally speaking, double insurance requires two policies to be taken out by the same insured. In the case of mortgages and leases, a policy taken out by one party often enures for the benefit of the other party. The two policies in the present case being in respect of the same premises, it was argued that the lessees had an equitable interest in the policy taken out by the lessors.

It is held, however, that, upon the particular terms of the clause here in question and the circumstances in which the policy had been effected, the lessees had no such interest, and therefore no case of double insurance arose.

As to Double Insurance, see HALSBURY, Hailsham Edn., Vol. 18, pp. 471, 472, paras. 708-711; and for Cases, see DIGEST, Vol. 29, pp. 318-320, Nos. 2628-2631.]

Cases referred to:

(1) *Waters* v. *Monarch Life Assurance Co.* (1856), 5 E. & B. 870; 29 Digest 311, *2568*; 25 L.J.Q.B. 102; 26 L.T.O.S. 217.

(2) *Grover & Grover, Ltd.* v. *Mathews*, [1910] 2 K.B. 401; 29 Digest 327, *2668*; 79 L.J.K.B. 1025; 102 L.T. 650.

(3) *Williams* v. *North China Insurance Co.* (1876), 1 C.P.D. 757; 29 Digest 89, *473*; 35 L.T. 884.

Action upon a Lloyd's fire insurance policy claiming that the plaintiffs, lessees of certain premises, were entitled to be indemnified by Lloyd's underwriters against the loss which the plaintiffs had sustained by the destruction by fire of the premises insured, the premises being also insured by the lessors with a second insurance company. The facts are fully set out in the judgment.

C. T. Le Quesne, K.C., and *H. H. Maddocks* for the plaintiffs.

F. Soskice for the first defendant.

H. U. Willink, K.C., and *G. O. Slade* for the second defendants.

Branson, J.: This action raises a number of interesting points, and arises in the following circumstances. The plaintiffs are the Portavon Cinema Co., Ltd., and the first defendant is a leading Lloyd's underwriter of a policy under which the underwriters insured the Portavon Cinema Co., Ltd., against loss by fire in respect of certain interests to which I shall have to refer in more detail hereafter. The second defendants are the Century Insurance Co., Ltd., Messrs. Woodward, who were the lessors of the Empire Cinema in Talbot Road, Port Talbot, Glamorganshire, leased it to the Portavon Cinema Co., Ltd., and, in circumstances which I shall have to consider, took out a policy insuring it against fire with the Century Insurance Co., Ltd. The Empire Cinema was burnt while both of those policies subsisted in relation to it, and the plaintiffs sued Lloyd's underwriters upon their policy, claiming to be indemnified against the loss which they had sustained, they being under contract to reinstate the cinema if it was burnt.

Lloyd's underwriters have raised a number of defences, and I think that it would conduce to clarity if I dealt with the facts of the case first, and called attention to the defences when I have ascertained the facts. There is very little dispute about the facts, which are as follows. In 1937, by a lease dated May 4, Woodward Theatres, Ltd., leased to the Portavon Cinema Co., Ltd., certain cinemas, including the Empire Cinema in Port Talbot, the one in question. Under that lease, the Portavon Cinema Co., Ltd., agreed that they would insure the premises against fire, and they agreed that, if the premises were burned, they would reinstate them. I do not think that it is necessary to go in detail into the language of that clause.

The lessors, Messrs. Woodward, were minded to raise a loan upon those premises from a company named the Friends' Provident and Century A Life Office, and that company had a subsidiary called the Century Insurance Co., Ltd. The Friends' Office (as I shall call it for short) were willing to lend the money, but only upon the term that the buildings should be insured against fire with their subsidiary office, the Century Insurance Co., Ltd. For one year, that insurance was taken out by the B Portavon Cinema Co., Ltd., and all was well. When the next year was approaching, whether because the negotiations for the loan had not materialised, or whether for some other reason I do not think it is material to discuss, the Portavon Cinema Co., Ltd., declined to continue their insurance with the Century Insurance Co., Ltd., and, instead of C continuing that insurance, they placed an insurance with Lloyd's, which is the insurance upon which the Portavon Cinema Co., Ltd., are now suing their underwriters.

When that became known to the Friends' Office and to the Century Insurance Co., Ltd., those bodies immediately objected, and took up D the position that, unless the insurance of those premises was given to the Century Insurance Co., Ltd., they would decline to go on with the negotiations for the loan to Messrs. Woodward. Thereupon Mr. Wehrle, Messrs. Woodward's solicitor, took out policies with the Century Insurance Co., Ltd., and endeavoured to get an agreement with Mr. Ewan Davies, E the solicitor and managing director of the plaintiffs, that the plaintiffs would cancel their policy with Lloyd's and hand over the premiums that they would have paid under the Lloyd's policies, and in return get an interest under the policy with the Century Insurance Co., Ltd. However, no such agreement was ever reached. Mr. Ewan Davies F objected, and, for reasons best known to himself, refused to have anything to do with the policy which had been taken out with the Century Insurance Co., Ltd., which remained a policy taken out by Mr. Wehrle, acting for Messrs. Woodward, for the sole reason, as appears quite clearly from the documents in the case, that, without such a policy, G Messrs. Woodward could not get the loan which they wanted to get from the Friends' Office. I think that there is no escape from that conclusion on the facts, and, if that is borne in mind, I think that it will help to clarify the legal position when I come to deal with it.

So much for the facts of the case. The result was that, when, on H Apr. 12, 1938, the Empire Cinema was burnt, there were in existence these two policies—namely, the Century policy insuring Messrs. Woodward, and the Lloyd's policy insuring the Portavon Cinema Co., Ltd. In those circumstances, the Portavon Cinema Co., Ltd., claim against Lloyd's payment of the amount of the loss which they have suffered. There is no question about figures, and I need not go into that matter.

Lloyd's then took, as I have said, a number of points in defence to that claim. I think that, in principle, it all comes to the same thing. They say that the effect of the taking out of the policy with the Century Insurance Co., Ltd., by Messrs. Woodward has been to call into operation cl. 4 of the general conditions of the Lloyd's policy. That condition reads as follows :

> This insurance does not cover any loss or damage or liability which at the time of the happening of such loss or damage or liability is insured by or would, but for the existence of this policy, be insured by any other policy or policies except in respect of any excess beyond the amount which would have been payable under such policy or policies had this insurance not been effected.

Lloyd's say that the Century policy is an insurance insuring the loss or damage or liability insured by their policy, and, therefore, in effect, that it is a case of double insurance, and comes under cl. 4.

I think it is necessary in the first place to say what, in my view, is the meaning of cl. 4. I do not think that there is any real dispute as to that. If one looks at the language used, without putting any restriction upon the wideness of it, it may be urged that the existence of any other insurance of any other type covering the particular loss or liability, though taken out by a stranger, and without the knowledge of the assured in question, would operate to bring that clause into effect. I think it is quite clear upon the authorities, however, that that cannot be said, and, indeed, counsel for the first defendant does not contend for any such construction in the present case. I think that the meaning is fairly dealt with in the passages which were cited from MACGILLIVRAY ON INSURANCE, 2nd Edn., p. 874, by counsel for the second defendants :

> The clauses, designed to effect these objects appear in many different forms and with many variations in detail, but in construing them it is always important to remember that they are aimed primarily at double insurance, that is, at cases where the assured has made contracts with other insurers upon the same property and the same interest and against the same risk, and unless a condition contains words which compel a different construction it ought only to be applied to cases which are strictly cases of double insurance.

I turn then to see whether there can be said to be any case of double insurance in the present instance. The first way in which it is contended that a double insurance was created is this. It is said that the taking out of the insurance with the Century Insurance Co., Ltd., by Messrs. Woodward raises an equity in favour of the Portavon Cinema Co., Ltd., and that, therefore, the Portavon Cinema Co., Ltd., having their own insurance with Lloyd's, and an equitable interest under the Century policy, there is a double insurance created. The first case which was cited for that proposition is *Waters* v. *Monarch Life Assurance Co.* (1). The case was tried before LORD CAMPBELL, C.J., and a verdict was found for the plaintiffs, subject to the opinion of the court upon a case stated. The facts were quite shortly these. The plaintiffs had taken out a policy of insurance with the defendants against fire, and that policy was, amongst other things, on goods in the plaintiffs' warehouse and on goods on trust or commission therein. The defendants had covenanted to make good any damage by fire to the property insured. The property was property in which the plaintiffs had an interest and also in which their customers had an interest, the customers being the owners of the property which the plaintiffs had in their warehouse. The question which was put before the court was whether, in the circumstances above stated, the plaintiffs were entitled to recover, and, if they were, what sum or sums, the plaintiffs suing the insurance company upon the policy. Upon that case, and in answer to that question, the court found that the plaintiffs were entitled to recover for the value of the goods, and, in giving judgment, LORD CAMPBELL, C.J. having dealt with the question as to whether or not the plaintiffs were entitled to judgment for the amount claimed, said, at p. 881:

> They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest.

That passage is seized upon by counsel for the first defendant as authority for the proposition that, in any case of that kind, where a person takes out an insurance upon goods which are not solely his own, a trust is created in favour of the owners of the goods in respect of their interest, whatever it may be, in them, subject to the interest of the person who has taken out the insurance.

The first comment I have to make upon that case is that that remark of LORD CAMPBELL, C.J., had nothing to do with anything which had been argued before the court or raised in the case before the court. Secondly, WIGHTMAN and CROMPTON, JJ., who were the other members of the court, said nothing whatever in their judgments about there being any equity at all. WIGHTMAN, J., said that there were two questions, the first being whether the goods destroyed were covered at all by the policies and proceeded to deal with that question. Then he said, at p. 882:

> Can the plaintiffs recover their value? It seems to me that they may, unless there be something making it illegal to insure more than the plaintiffs' own interest.

It was upon that ground that he decided that the plaintiffs were entitled to recover the whole value. CROMPTON, J., gave judgment upon the same lines. He said that they were persons interested in every particle of the goods, both in respect of their lien and in respect of their responsibility to their bailors, and that they were entitled to recover the judgment for which they asked, that is, for the whole of the value.

That really is the only authority which it is suggested shows that there is any equitable right raised in a case of this kind merely by the fact that one person takes out an insurance upon buildings in which not only he himself but also somebody else is interested. In my view, no such equity arises in this case. That is particularly due to the finding which I have already made in relation to the facts of the case—namely, that this was not a case in which Messrs. Woodward or Mr. Wehrle were taking out this insurance with any intention of giving a present interest in it to the plaintiffs, the Portavon Cinema Co., Ltd. The utmost that

can be said is that, when Mr. Wehrle took out this insurance, he probably
hoped to be able to make some arrangement with Mr. Ewan Davies
under which Mr. Ewan Davies' company—the Portavon Cinema Co.,
Ltd.—would take over the insurance, provided that Messrs. Woodward
would pay any excess in the amount of the premium over and above
that at which the plaintiffs had been able to secure the Lloyd's policy. A
The mere taking out of a policy cannot possibly give an equity to somebody
else. An intention is necessary, and I am satisfied that, when
this policy was taken out, there was no such intention in the minds
of Mr. Wehrle or Messrs. Woodward.

Then it is said that, supposing that that is not the case, yet there was a B
declaration of trust when the Century Insurance Co., Ltd., at the request
of Mr. Wehrle, indorsed a memorandum upon the Century policy.
Mr. Wehrle has not been called, and one can only guess at what his
intentions in the matter were, but in Apr., 1938, Mr. Atkinson, the
solicitor for the Century Insurance Co., Ltd., wrote a letter to the Century C
Insurance Co., Ltd., telling them to put this memorandum upon the
policy:

> The loan by the office to Woodward Theatres, Ltd., was made yesterday. I
> received at completion the four policies mentioned in the list. . . . Will you please
> have each of them indorsed with a memorandum showing that the office is interested
> as mortgagee and the Portavon Cinema Co., Ltd., of 10, Windsor Place, Cardiff, D
> is also interested as lessee, and return them to me.

That was done. It is said that that was a declaration of trust made
by Messrs. Woodward (who, after all, were the people in whose favour
the policy with the Century Insurance Co., Ltd., had been issued) in
favour of the Portavon Cinema Co., Ltd. I cannot see that there is really E
any excuse for saying so. The declaration is not made by Messrs.
Woodward. It is not made by Messrs. Woodward's solicitor. It is
made by the solicitor to the Century Insurance Co., Ltd. How he came
to make the suggestion has not been investigated, because none of these
gentlemen has been called before me, and I decline to draw inferences F
of that kind, in the absence of proof, from the mere fact that a letter is
written by Mr. Atkinson giving that instruction to the company whose
solicitor he was.

Then counsel for the first defendant says that, if there is not a
declaration of trust, then I am to infer that the Century policy was taken G
out by the authority of the Portavon Cinema Co., Ltd. I think that
the answer to that is again to be found in the documents. I need not
refer to them, but the letters of Mr. Ewan Davies make it clear beyond
peradventure that, so far from authorising anybody to take out policies
with the Century Insurance Co., Ltd., when those policies were being H
taken out, he was saying that he would have nothing whatever to do
with them, though he did say that, with regard to future years, he would
be prepared to invite his company to do what they could to make things
easy for Messrs. Woodward in respect of the loan that Messrs. Woodward
required to get. That, again, is a pure question of fact, and, as I say,

I see no evidence to support the suggestion of authority from the Portavon Cinema Co., Ltd., to anybody to take out this policy with the Century Insurance Co., Ltd.

The next point is this. It is said that, supposing that the court comes to the conclusion that there was no authority, yet there was ratification. A The answer to that is quite a short answer, and is to be found in *Grover & Grover, Ltd.* v. *Mathews* (2). In that case, HAMILTON, J., saying that he was bound by a decision in the Court of Appeal, came to the conclusion that one could not ratify a fire policy which had been taken out after the loss had arisen, and said, at p. 404:

B

> . . . it appears to me that the judgments in *Williams* v. *North China Insurance Co.* (3), which is a decision of the Court of Appeal, compel me to say that it was too late for ratification; because, as it appears to me, the Court of Appeal in *Williams* v. *North China Insurance Co.* (3) recognised that a rule which would permit a principal to ratify an insurance even after the loss was known to him was an anomalous rule which it was not, for business reasons, desirable to extend, and which, according to the authorities, had existed only in connection with marine insurance. No case C has been cited to me which suggests that this anomalous rule ought to be extended to fire insurance.

Counsel for the first defendant urges me, with what I might perhaps describe as vicarious courage, to refuse to follow that decision and hold that the rule should be extended. However, I have not the boldness of D youth, and I decline to differ from HAMILTON, J.

That leaves two ways in which the matter is attempted to be dealt with. Perhaps it is one way, and the objection to it under the Act of 1774. It is said that the Fires Prevention (Metropolis) Act, 1774, s. 83, enacting, as it does, that any person interested in, or entitled to, any E house or houses or other buildings which may thereafter be burned down or damaged, and so on, by fire, may give notice to the governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, calling upon them to expend the insurance moneys upon reinstating the premises burnt down, has the effect of giving F anybody entitled to any interest in a building upon which an insurance has been effected by somebody else an insurance upon that building. In my view, that is a misinterpretation of the statute. There is all the difference in the world between giving A, who is interested in the premises upon which B has taken out a policy, a right to call upon B's insurers to G expend those policy moneys upon the property, and saying that the statute has invested A with an insurance upon those properties. One is a statutory right and the other is a right arising *ex contractu*, and I think that it is quite wrong to say that the effect of the Fires Prevention (Metropolis) Act, 1774, s. 83, is to make anybody an insured. What H it does do is to give him, though not an insured, a statutory right to direct people who have to pay moneys to an insured in respect of premises to expend those moneys in a particular way.

That makes it unnecessary to deal with the other question which is raised—namely, whether or not Lloyd's underwriters fall within the description "governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire," which is the description of persons who can be called upon to spend the money in reinstatement of places burnt under that section. It is suggested, first of all, that the words might apply to the corporation of Lloyd's. The answer to that is that the corporation of Lloyd's do not insure anybody against anything. It is the underwriters who undertake the burden of insurances.

Then it is said that, when one finds a certain group of underwriters continually acting as a body, allowing their names to be written by a particular individual, that might be such an association of persons as to fall within the language of the Act. Again, I disagree. If one thing is plain with regard to underwriting by members of Lloyd's, it is that each member makes a contract for himself for the amount of his liability, the contract being an independent contract of his own, and he is in no way interested in the other contracts undertaken at the same time by other members who underwrite the same policy. No authority is needed for that which, by now, one would have thought was known to everybody who had to deal with Lloyd's policies and the liabilities of underwriters under them. Thus, that endeavour to bring about a double insurance in this case also fails.

That leaves only one point to be dealt with on the question of law. It is said by counsel for the second defendants that, even supposing that there were a declaration of trust, and supposing that, by means of the Fires Prevention (Metropolis) Act, 1774, some insurance right was created for the Portavon Cinema Co., Ltd., still there is no double insurance, because, if any such right were created, the Portavon Cinema Co., Ltd., not having its name put in the Century policy, that policy is an unlawful policy under the Life Assurance Act, 1774, s. 2, except perhaps that insurances *bona fide* made by any person or persons on ships, goods or merchandise are excluded from the operation of the Act by sect. 4 thereof. As I say, it is not material to decide that point, because I have already decided that, in my view, no double insurance has been created, and, therefore, it was quite right in the Century policy not to put in the name of the Portavon Cinema Co., Ltd.

For those reasons, I have come to the conclusion that the defence of Lloyd's underwriters fails in general.

Judgment for the plaintiffs against the first defendant for a sum to be agreed between the parties. Costs of plaintiffs and second defendants to be paid by first defendant.

Solicitors: *Wrentmore & Son*, agents for *Ewan G. Davies*, Cardiff (for the plaintiff); *Chamberlain & Co.* (for the first defendant); *J. Shera Atkinson* (for the second defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

FRASER-WALLAS AND ANOTHER *v.* ELSIE AND DORIS WATERS (A FIRM).

[KING'S BENCH DIVISION (Lord Hewart, L.C.J.), **November 28, 29, 1939.**]

Negligence—Producer of variety programme—Heel of dancer's shoe becoming detached and hitting member of audience—Whether dancer servant or independent contractor—Standard of care required.

The defendants, who were two sisters in partnership, entered into an agreement with the management of a music-hall to present a variety programme there, and they in turn made an agreement with certain artists whereby the latter accepted an engagement to appear "subject to the conditions of the Arbitrator's Award, 1919." The plaintiffs, who were husband and wife, attended a performance, which included a turn by those artists. As part of this turn, one of them gave a kick, with the result that the heel of one of his shoes came off, flew through the air, and hit the female plaintiff in the face, causing her injury. The shoes were of a well-known make, were quite new, and had been cleaned personally by the wearer, and no accident of this kind had ever occurred in the past. The plaintiffs alleged that the accident occurred through the negligence of the defendants or their servants:—

HELD: (i) the relationship of master and servant had not been constituted by the contract between the defendants and the artists, even though the defendants exercised over the artists a certain amount of supervision and control.

(ii) the only obligation of the defendants to a member of the audience was that arising between an invitor and an invitee—namely, the obligation to take reasonable care.

(iii) there had been no negligence on the part of the artist whose shoe had caused the injury.

[**EDITORIAL NOTE.** The position as between the proprietor of an entertainment—that is, the person receiving the entrance money—and the person paying to see it has recently been considered in a line of decisions. The present circumstances are exceptional, because the parties sued were not the proprietors of the entertainment, but were a firm who by contract supplied certain of the artists. The question, therefore, is what is the liability of such a firm to a paying spectator. It is held that this liability is the same as that between an invitor and an invitee.

AS TO RISKS INCIDENT TO ENTERTAINMENTS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 718, 719, para. 1009; and FOR CASES, see DIGEST, Vol. 36, pp. 40, 41, Nos. 242-246.]

Cases referred to:

(1) *Cox* v. *Coulson*, [1916] 2 K.B. 177; 42 Digest 909, *53*; 85 L.J.K.B. 1081; 114 L.T. 599.

(2) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, *208*; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.

(3) *Norman* v. *Great Western Ry. Co.*, [1915] 1 K.B. 584; 38 Digest 352, *580*; 84 L.J.K.B. 598; 112 L.T. 266.

(4) *Hurst* v. *Picture Theatres, Ltd.*, [1915] 1 K.B. 1; 42 Digest 905, *23*; 83 L.J.K.B. 1836; 111 L.T. 972.

ACTION for damages by two plaintiffs, husband and wife, for injuries received by the female plaintiff through being struck in the face by a heel of a dancer's shoe while attending a performance of a variety programme at the Wood Green Empire. The plaintiffs alleged negligence on the part of the defendants as producers of the programme or on the part of the dancer as their servant. The facts are fully set out in the judgment.

Denis Murphy for the plaintiffs.

Lionel Jellinek for the defendants.

LORD HEWART, L.C.J.: In this case, the plaintiffs, Robin Fraser-Wallas and his wife Violet Fraser-Wallas, sue the defendants, Elsie and Doris Waters (a partnership firm), for damages for negligence. The statement of claim states as follows:

> The plaintiffs' claim is for damages for negligence and/or breach of duty in and about the production of a variety show.

The evidence may be very shortly re-stated. It appears that on Nov. 12, 1937, the two plaintiffs went to a performance at the Wood Green Empire in the High Road, Wood Green, and witnessed a performance of a variety show given by certain performers, including a turn which was called "The Four Playboys." The plaintiffs allege that during the progress of the variety show, and by reason of the negligence of the defendants, their servants or agents, the heel of the dancing-shoe of one of the dancers engaged in the show became detached from the shoe and hit the female plaintiff violently in the face, doing damage and causing injury.

The evidence of the husband was that in the course of the performance he saw one of the performers give a kick on the stage. He said that the heel of the player's shoe flew through the air and hit the female plaintiff on the jaw. He asked to see the shoe and the heel, and he came to the conclusion that it was a heel of heavy rubber, or composition. Mrs. Fraser-Wallas gave evidence that she saw something come through the air, and that she put her hands to her face, and remembered nothing more. A player in the orchestra was called, and he said that, at the moment when he made a crash on the drum, the heel of the shoe of one of the performers flew off. The performer kicked, and the heel of his shoe flew off. The player in the orchestra went on to say that the kick was modified on the following night. That means that the man who kicked did not kick so strongly. A doctor gave evidence on behalf of the plaintiffs, and also a dental surgeon.

For the defendants, one of the Four Playboys was called. He said that during his performance he made a kick at an imaginary figure. He was not aware that the heel of his shoe had come off until he put his foot down. He said that his shoes were only a few weeks old, that he cleaned his own shoes, and that no such accident had ever occurred during his performance before, and he had been doing that performance for two or three years. In cross-examination, he added that the motion which he made was a sliding movement of the foot.

Dr. Anderson was called for the defendants. He had attended the female plaintiff immediately after the happening of the accident on

Nov. 12, 1937, and he said that the wound which he discovered was a wound skin-deep, and in size about ¼ in. to ⅓ in. One of the defendants, Miss Doris Waters, was called. She said that she was in partnership with her sister, and that they presented a programme of variety turns at the Wood Green Empire during the week ending Nov. 13, 1937. According to her evidence, the owner of the particular turn had control over that turn, and she referred to the Arbitrator's Award, 1919, Contract as being the standard contract :

> As long as the artists abide by the terms of their contract, my sister and I have no control over them.

There are several features in this case on which I need not dwell. One of them is that it was not until 5 months after the accident that any complaint was made to the defendants, and it was not until 11months after the accident that the writ was issued. It was quite obvious to me as I heard the evidence that the plaintiffs' case was manifestly exaggerated, and I refrain from criticising it further.

In regard to the legal position, some discussion naturally arose. It is to be observed that the defendants are not, and are not sued as, the owners or the lessees of the Wood Green Empire, and it was made clear in the course of the case that they held no such position. What their exact position was I will endeavour in a few moments to state.

My attention was directed by counsel for the defendants, partly by way of comparison and partly by way of contrast, to *Cox* v. *Coulson* (1). That case is certainly deserving of attention in relation to the present case. The headnote there is as follows :

> The defendant was the lessee and manager of a theatre. He had arranged for the performance of a play in his theatre with the manager of a touring theatrical company, who was to provide actors and scenery, the defendant providing the theatre, the lighting, and the playbills ; each took an agreed proportion of the receipts. The plaintiff took and occupied a seat in the theatre ; during the performance an actor fired a pistol, which should have contained only a blank cartridge, but in the barrel of which, by some unexplained mischance, there was also a second cartridge of smaller size, which when the pistol was fired struck the plaintiff on the wrist, inflicting a serious wound.

The case came originally before a county court judge, who held as follows :

> . . . it was an implied term of the contract between the plaintiff and the defendant that all persons connected with the performance of the play should exercise reasonable care so that members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care.

The decision of the county court judge was taken on appeal to a Divisional Court, and BAILHACHE and SHEARMAN, JJ., heard the appeal. It was made plain in the course of the arguments [p. 178] that :

> . . . by some mischance, of which no explanation was given, there was also in the barrel of the pistol a second cartridge, of smaller size than the one with which the pistol was properly loaded ; the pistol, when fired, was pointed by the actor towards the audience, and the plaintiff was struck in the wrist by the loose cartridge . . .

In the Divisional Court, BAILHACHE and SHEARMAN, JJ., did not take quite the same view of the matter, and, in the result, the case was taken to the Court of Appeal. Swinfen Eady, L.J., as he then was, delivering judgment in the Court of Appeal, referred to the fact that the plaintiff in that case, who was a domestic servant, took a seat in the dress circle for the performance, for which she paid 9*d*. He then considered the facts of the case, and said, at pp. 181-183:

> A If the defendant is under any liability it must arise out of the contract which was made when, having held out by means of the playbill an invitation to his theatre, he issued a ticket to the plaintiff and received her 9*d*. The contract, whatever its implied terms may be, was made between the defendant and the plaintiff, as the defendant received the takings from the persons paying and issued the tickets to them . . . Is there, then, to be implied, in the contract between the plaintiff and the defendant, any term with regard to the play apart from the premises in which the play is to be performed? The play involved the use of B firearms, and according to the evidence included a scene in which a wireless station was defended against an enemy; the performers were dressed as soldiers and were shooting with revolvers. Such a scene, properly performed and without negligence, would be free from danger, but injury would be likely to result from it unless care was taken in loading and using the firearms. The county court judge held that it was an implied term of the contract between the defendant and the playgoer that all persons connected with the performance of the play should C exercise reasonable care so that the members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care. In my opinion this is too wide, and there is no authority and no principle upon which so extended a liability can be said to rest upon a person who, for reward, agrees that others shall enter his premises and witness the performance of a play there. Upon this footing the defendant would be liable for any negligence of the performers as if they were his servants. It was, however, upon this view of the law that the judgment of the county court judge proceeded . . . If there are D incidents in a play which are intrinsically dangerous unless carefully performed, especially if they involve the use of firearms, and which the manager knew or ought to have known of, then, in my opinion, it is an implied term of the contract between the playgoer and the other contracting party that such contracting party will use reasonable care and diligence to see that such incidents are performed without risk to the playgoer. He is not, however, under liability for any accident which he could not have prevented by the exercise of reasonable care or super- E vision, but which happens through some carelessness or want of skill on the part of a member of the company. He does not warrant that there shall be no such negligence or want of skill. His liability is that of an invitor towards an invitee as expressed in *Indermaur* v. *Dames* (2) and in *Norman* v. *Great Western Ry. Co.* (3) *per* Buckley, L.J.: "The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it." F

The next judgment in *Cox* v. *Coulson* (1) was delivered by Pickford, L.J. He began by saying, at pp. 185, 186:

> This case raises a question on which there is very little authority, i.e., what is the responsibility of the lessee of a theatre towards a person who takes a ticket G for admission to that theatre when a performance is given by a travelling company not engaged by the defendant and the lessee takes a part of the sum paid for admission . . . The nature of the contract is, I think, correctly stated by Buckley, L.J., in *Hurst* v. *Picture Theatres, Ltd.* (4): "The plaintiff in the present action paid his money to enjoy the sight of a particular spectacle. He was anxious to go into a picture theatre to see a series of views or pictures during, I suppose, an hour or a couple of hours. That which was granted to him was the right to enjoy looking at a spectacle, to attend a performance from its beginning to its end." H The learned judge was considering the matter from a different point of view, but I think those words correctly express the result of the contract: see also the judgment of Kennedy, L.J. This, I think, creates the relationship of invitor and invitee, and in such a case, from the nature of the invitation, the defendant's obligation, I think, is not confined to the structure. In addition to his obligation with regard to the structure and the further obligation not to give a performance of an intrinsically dangerous nature, or, if he do so, to take the consequences, he is, I think, under an obligation to take reasonable care that the performance of

> the play does not expose to danger the person whom he invites to see it. If there be incidents in it which are dangerous in their nature if proper precautions are not taken, he would have to take greater precautions than if there were no such incidents, and I think that he must exercise reasonable care and skill in seeing that such precautions are taken.

Finally, BANKES, L.J., delivering judgment in the same case, said, at pp. 191, 192:

> What then are the rights and obligations of the parties if the entertainment is provided, as it was in the present case, by an independent company, some member of which was guilty of the negligence which caused the plaintiff's injury? These rights and obligations may, I think, be best described as being those of an invitee and an invitor as applied to the members of an audience invited to a theatre by the owner or lessee of the building to witness an entertainment there provided by persons who are not in his employ. The duty of the invitor is expressed in general terms by BUCKLEY, L.J., in *Norman* v. *Great Western Ry. Co.* (3) in these words, at p. 592: "The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it." It seems to me obvious that the duty of the invitor in a case like the present is not only confined to the state of the premises, using that expression as extending to the structure merely The duty must to some extent extend to the performance given in the structure, because the performance may be of such a kind as to render the structure an unsafe place to be in whilst the performance is going on, or it may be of such a kind as to render the structure unsafe unless some obvious precaution is taken. As an illustration under the latter head I would instance a case where a tight-rope dancer performs on a rope stretched over the heads of the audience. In such a case the provision of a net under the rope to protect the audience in case the performer fell seems so obvious a precaution to take that in the absence of it the premises could not be said to be reasonably safe. In the present case the performance was one which included a discharge of pistols loaded with blank ammunition as one of the incidents. If the pistols had been properly loaded, it is difficult to see that the incident exposed any member of the audience in any ordinarily constructed theatre to any danger. On the other hand, if any one of the pistols was not properly loaded, what would otherwise be a safe performance became an exceedingly dangerous one, and any part of the auditorium might be rendered an extremely unsafe place to be in. Whether the circumstances were such that any negligence or want of proper care can be attributed to the appellant in relation to the loading of the pistol or in relation to the ammunition supplied for that purpose has not been investigated, and I do not think that justice can be done between the parties until this is done.

Accordingly, a new trial was ordered in that case, in order that, as BANKES, L.J., said, at p. 192:

> . . . the county court judge may investigate the circumstances and come to a conclusion upon them as to whether, in the sense which I have endeavoured to indicate, the appellant did or did not fail in the duty which he owed to the respondent of taking reasonable care that the respondent was not exposed to unusual danger of which he either knew or ought to have known.

That case, as I have said, was referred to in the present case by counsel for the defendants, partly by way of comparison and partly by way of contrast. Some points of the contrast are perfectly obvious. *Cox* v. *Coulson* (1) was a case which turned upon contract. The present case is a case which depends upon the allegation of tort. There was no contract here between the plaintiffs in this action and the defendants—no contract whatsoever—and the whole case against the defendants is a case of negligence, as it is alleged on behalf of the plaintiffs.

It was contended—or, at any rate, it was suggested in the course of the argument, no authority being cited—that in the present case the performers on the stage were the servants of these defendants. It was not suggested, as it could not be suggested, that there was anything in the performance of an intrinsically dangerous character. One performance which it was suggested bore some analogy to the performance in this case was where pistols and ammunition were likely to be used. The question whether the man the heel of whose shoe came off was a servant of the defendants was a somewhat different question. The agreement which existed was made between the Hackney and Shepherds Bush A Empire Palaces, Ltd., "the management of the one part," and the defendants of the other part, and it was agreed for certain consideration that the defendants, who, for the purposes of this contract, were called the "producer," would provide, produce and present at the Wood Green Empire a variety programme : B

> . . . at two performances nightly and at any matinées required by the management, during the week commencing Nov. 8, 1937.

Clause 2 of the contract provides as follows :

> The management will give the requisite use of the said theatre, stock sceneries, stock properties (but not consumable or perishable properties) and such orchestra and stage staff as are usually employed at the said theatre. C

Clause 3 provides as follows :

> The producer agrees to provide a full and efficient variety programme including Elsie and Doris Waters and supporting company to be the same as will play G.T.C. Houses prior to this date. The whole to be to the entire satisfaction of the management.

D

Clause 4 provides as follows :

> The producer undertakes that the performances shall not be dangerous or likely to cause injury to persons or property . . .

Then there are other provisions to which I need not refer, and stipulations with regard to the sharing of receipts. That was the contract between E the defendants and the management of the theatre.

Then the defendants for their part had made another contract, which was called an emergency contract. It was a contract made between them as the management of the one part and the Playboys, thereinafter called the artist, of the other part, whereby the management : F

> . . . engages the artist and the artist accepts an engagement to appear as required (or in his usual entertainment) at the theatre . . .

That contract, as a line in black type shows, is "Subject to the conditions of the Arbitrator's Award, 1919."

My attention was also directed, and properly directed, to that document, the Arbitrator's Award, 1919, which, according to the evidence, G was at the material time the standard contract in such a case as this. That contract imposes many obligations. Under it, for example, the artist—that is to say, the individual performer—undertakes in cl. 9 that his performance :

H

> . . . shall not be dangerous to the artists, audience, or theatre employees. If any accident or injury results from the performance of the artist through the artist's default, the artist shall pay for any loss occasioned to, or damage or costs incurred by, the management.

Again, by clause 13, it is provided as follows :

> If the artist's performance is contrary to law, or is objected to by any licensing

> or other public authority, the contract in respect to which the objection is made may be cancelled by the management.

By clause 19, it is further provided as follows:

> The annexed rules and regulations shall be read and construed as forming part of this contract, and the artist agrees to abide by all reasonable rules which may from time to time be made by the management for the good and orderly conduct or special requirements of their theatres, and which do not conflict with the terms and conditions of this contract, provided that such rules shall have been served on or brought to the notice of the artist.

In my opinion, when I look at these documents, and when I consider the evidence given in this case, it does not appear to be the true conclusion that the performers in the variety turn called "The Four Playboys" were the servants of the defendants. They had a contractual relationship with them. A certain degree of supervision was undoubtedly involved, but I do not think that the relationship of master and servant, employer and employed, was constituted by the contract. Although the term "producer" seems to have been not very aptly applied to this case, undoubtedly there was a relationship between the defendants and the individual players in the variety turn, and that relationship involved a certain element of supervision and control. According to Miss Doris Waters, as long as the artists abode by the terms of their contract, she and her sister had no control over them. I do not think I am putting the matter too high, but, at any rate, I cannot extract from these documents or from this evidence any obligation on the part of the defendants to a member of the audience in this theatre—which was not the defendants' theatre, and from the management of which the defendants received no payment directly—higher than the obligation which arises between an invitor and an invitee, and that obligation is the obligation to take reasonable care. I cannot find from the evidence in this case that there was any higher obligation than that which was expressed, for example, by BUCKLEY, L.J., in *Norman* v. *Great Western Ry. Co.* (3), at p. 592:

> The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it.

This was a most unfortunate accident. Naturally it was an unpleasant one, and, for the moment, of a startling character, but it was an accident of a kind which had never happened before, and an accident of a kind which there was no reason to expect. There was no danger of an intrinsic character involved in this particular performance, and it cannot be said that there was any danger of which the defendants knew or ought to have known. It was said, and indeed it was said with reiteration, that here there was negligence on the part of somebody. I see no evidence of any negligence on the part of these defendants, and, having heard the very fair evidence of Mr. Leslie West Murphy, who was one of the Four Playboys, I think that there are no grounds for suggesting that there was any negligence on his part. He had, so far as he knew, a perfectly proper shoe, purchased from a well-known company of makers and suppliers. He had used the same sort of shoe for a long time, doing exactly the same kind of performance, and no evil consequence had followed. In my opinion, there was no reason to apprehend danger, and there was no failure, either on the part of the performer himself or on the part of these defendants, to take reasonable care.

It is to be observed that, while in the evidence one of the witnesses suggested that on the night of this accident the particular performer gave a rather violent kick, there is no such allegation as that in the statement of claim. Nor am I prepared to accept that evidence. The case for the plaintiffs, in my opinion, is disfigured by manifest exaggeration. I refrain from commenting further upon it. It is enough to say that I do not think that these defendants are liable under the head of negligence or otherwise, and it is on negligence, and on negligence alone, that this action is founded.

So far as damages are concerned, the question does not now arise, but, if it had arisen, and if I had had to assess damages in this case, I should not have awarded more than the modest sum of £50 to be divided in equal parts of £25 each for the two plaintiffs. However, as I have said, that is a purely academic point, because I do not think that these defendants are liable at all. I therefore give judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *Godfrey A. Elkin* (for the plaintiffs); *Bevan & Co.* (for the defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

ROUSOU *v.* PHOTI (GORT ESTATES CO., THIRD PARTY)

[King's Bench Division (Atkinson, J.) **December 8, 15, 1939.**]

Landlord and Tenant—Fitness of property for human habitation—Condition implied by statute—Rent not exceeding £40 *per annum—Whether inclusive or exclusive rent—Housing Act,* 1936 (*c.* 51), *s.* 2.

Practice—Costs—Poor person—Burden on solicitor—Proportion of profits costs—R.S.C., Ord. 16, *r.* 31B.

A part of a house was let to the defendant at 17*s.* 6*d.* per week. The corresponding annual rent would be £45 10*s.* The landlord paid all rates and taxes, which admittedly amounted to more than £5 10*s.* The defendant sub-let one room to the plaintiff, who was injured by a fall of the ceiling in that room. The plaintiff brought the present action for damages and the defendant's landlord was added as a third party. The question whether this part of a house was let at a rent not exceeding £40 within the meaning of the Housing Act, 1936, s. 2, was ordered to be tried as a preliminary point of law. The plaintiff and defendant in the action had been granted a poor person's certificate and an application was made that the defendant's solicitor might receive a proportion of his profit costs:—

Held: (i) "rent" in the section means the net rent, that is, the rent paid less the rates and taxes.

(ii) the defendant's solicitor, by reason of the setting down of this preliminary issue, had had to bear a greater burden than he might ordinarily expect in a poor person's case, and was entitled under R.S.C., Ord. 16, r. 31B, to an order that he receive £5 5*s*. in addition to his out-of-pocket expenses.

[EDITORIAL NOTE. The judge here has followed the conclusion of LEWIS, J., in *Jones & Jones* v. *Nelson* (4), but, in the latter case, the point did not require to be decided. The point is, therefore, now settled so far as a court of first instance is concerned. The order as to costs is, of course, purely one for the discretion of A the court in each case, and is only of importance in showing that in a case of this nature such an application can be made. Whether such an application is granted is a matter to be decided solely on the merits of each particular case.

AS TO IMPLIED CONDITION OF FITNESS FOR HUMAN HABITATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 204, para. 222; and FOR CASES, see DIGEST, Vol. 31, p. 181, Nos. 3158-3160.

B AS TO POOR PERSON'S COSTS, see YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 239, 240.]

Cases referred to:

(1) *Sheffield Waterworks Co.* v. *Bennett* (1872), L.R. 7 Exch. 409; 43 Digest 1088, *209*; 41 L.J.Ex. 233; 27 L.T. 199; *affd.* (1873), L.R. 8 Exch. 196; 42 L.J.Ex. 121; 28 L.T. 509.

C (2) *Smith* v. *Birmingham Corpn.* (1883), 11 Q.B.D. 195; 43 Digest 1088, *210*; 52 L.J.M.C. 81; 49 L.T. 25.

(3) *Wilkinson* v. *Bury Water Board* (1905), 92 L.T. 417; 43 Digest 1089, *215*.

(4) *Jones & Jones* v. *Nelson*, [1938] 2 All E.R. 171; Digest Supp.

(5) *Mackworth* v. *Hellard*, [1921] 2 K.B. 755; 31 Digest 563, *7111*; 90 L.J.K.B. 693; 125 L.T. 451.

D

PRELIMINARY ISSUE to determine the proper construction of the Housing Act, 1936, s. 2, the question being whether the words "the rent" used in that section mean inclusive or exclusive rent. The facts are fully set out in the judgment.

E *N. J. Skelhorn* for the defendant.

G. F. Kingham for the third party.

ATKINSON, J.: In this case, the defendant is tenant of two rooms on the second floor which he rents from the Gort Estates Co., and he claims to be indemnified by the company against the plaintiff's claim F on the ground that the letting is within the Housing Act, 1936, s. 2, and that, therefore, it was a term of the letting that the premises were, and would be kept, fit for human habitation.

On Oct. 24, 1939, an order was made that the defendant and the third party, Gort Estates Co., proceed to trial of the issue as to whether G or not the letting was within the provisions of the Housing Act, 1936. There is no dispute as to the facts. The accident happened in Sept., 1937. On July 26, 1937, the Gort Estates Co. let the second floor of No. 27, Stephen Street, to the defendant at a rent of 17*s*. 6*d*. per week, payable in advance, the company paying all rates and taxes. In H 12 months, if the tenancy lasted as long as that, a sum of £45 10*s*. would be paid by the tenant. It is agreed that the rates and taxes paid in respect of the premises let to the defendant exceed the sum of £5 10*s*. The Housing Act, 1936, s. 2, provides as follows:

> (1) In any contract for letting for human habitation a house at a rent not exceeding (*a*) in the case of a house situate in the administrative county of London, £40;

> (*b*) in the case of a house situate elsewhere, £26; there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation:

The definition of "house," which is in subsect. (3), is as follows:

> . . . the expression "house" includes part of a house.

The main question is in regard to the meaning of the word "rent" in that section. It is said by the company that it means the sum at which the house is let, the amount actually paid by the tenant to the landlord notwithstanding that the landlord has to pay away part of that sum in rates, etc., and, further, that, if one multiplies 17*s.* 6*d.* by 52, the amount comes to over £40 in a year, and, therefore, the house is outside the section. For the tenant, it is said that the section refers to the true or net rent, a sum arrived at after deducting at least the rates and taxes payable, and, further, that a weekly letting at 17*s.* 6*d.* is not the same as a yearly letting at £45 10*s.*, as the latter sum makes no allowance for what is called "voids."

The first point noticeable about the section is that it does not indicate any period in respect of which the rent of £40 is to be payable, but I think it must be taken—and I understand that both counsel take the same view—that the legislature had in mind a yearly letting of £40. If by "rent" is meant the actual sum agreed to be paid by a tenant, as the third party contends, it would seem that weekly tenancies are not provided for. I have great difficulty in seeing how a contract to take a house on a weekly tenancy is the same thing as a contract to take a house at a yearly rental, and yet it is impossible to suppose that the legislature meant to exclude houses let on weekly terms. The declared aim of the statute was to protect the small houses. The heading immediately above cl. 2 reads as follows:

> Provisions for securing the repair, maintenance and sanitary condition of houses. Obligation of lessors of small houses.

The marginal note is:

> Conditions to be implied on the letting of small houses.

On the other hand, if by "rent" is meant the sum which represents the true annual value or net rent, this difficulty is avoided. The section would read in this way: "In any contract for letting a house at a sum which indicates a true annual value or rent not exceeding £40. . . ." Again, the declared aim being to protect small houses, it is reasonable to suppose that the legislature meant to provide a uniform standard whereby to decide whether or not a house was a small house. One man has two houses exactly alike side by side. He lets one at £30 per annum, the tenant paying rates and taxes amounting to, let us say, £12. It is admitted that this house is within the section. The other is let at £42, the landlord paying the rates and taxes of £12. Can it reasonably be said that this house is not equally as small a house as the other? Can it really be thought that the legislature meant to protect the one and not the other? Can an astute landlord take a house out of the Act by saying, "I will pay the rates and taxes," and then adding the amount to the rent? Again, there is no means of comparison with other houses as regards their worth if the introduction of adventitious advantages can be taken into consideration in fixing rent. It seems to me that one is driven to the conclusion that the legislature had in mind the sum the tenant pays for the right to occupy the premises in a normal state and without adventitious advantages, or, putting it the other way round, the sum which the landlord would put into his pocket in a year for rent after paying rates and taxes.

There are several cases which throw light on the problem, and which I think indicate that that is the true view. The first to which I was referred was *Sheffield Waterworks Co.* v. *Bennett* (1). By a local Act, the plaintiffs there, according to the headnote:

> . . . were bound to supply the houses within a certain district with water "at the following rate per annum, that is to say, where the rent of such dwelling-house" should not amount to £7 per annum, at a rate not exceeding 6 per cent. per annum on such rent. . . . The defendant was owner of numerous small houses supplied with water by the plaintiffs, in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor-rate, water-rate, and district-rate: HELD: that rent in sect. 79 was equivalent to annual value, and that in estimating the rents on which the water-rate was payable, the defendant was entitled to deduct the rates so paid by him.

In the same case, **BRAMWELL**, B., pointed out, at p. 416, one of the difficulties to which I have alluded.

> On the other hand, the defendant insisted that it was impossible that the word "rent" could have the meaning contended for by the plaintiffs; and he called attention to the fact that the Act always speaks of the rent "per annum" of the premises, so that where there was no letting at a yearly rent, but from month to month or week to week, the case was on that construction not provided for.

Later, he said, at p. 418:

> But the defendant, as I said before, contends that this [the amount included for rates] really is no part of the rent; it is not part of the annual value of the premises. . . . It would be unreasonable to say that these things contributed to the rent of the houses, although as between landlord and tenant they might conveniently use the term "rent," and agree that it should be distrained for, and in point of law it might all issue out of the realty. It is impossible to suppose that, for the purposes of the Act of Parliament, and to enable the company to charge rates upon the sum so payable, it would be rent.

Both the judgments really contain a lot of helpful matter. I do not want to read more than is necessary, but there is a paragraph in the judgment of **CLEASBY**, B., at p. 420:

> The word "rent" cannot signify strictly the rent actually or accidentally paid. In a row of houses all of equal value, one might be let at a nominal rent from love or affection; another might be let at a greatly reduced rent to a servant in the employ of the landlord; another might yield a small rent because the tenant had repaired the house himself or paid a premium; and no one would contend that in any such cases the actual rent would be the criterion. It would not be the criterion in any case in which it does not form a means of comparison with other houses as regards their worth. In general, the rent paid is what the house is worth, and is the real criterion of value as distinguished from a mere estimate. It makes the test a fact which is certain, and excludes partiality.

He proceeded to hold that the word "rent" in the section meant the proper rent to a tenant paying the rates and charges regularly paid by the tenant, of which the actual rent, when the tenant does pay those rates and charges, is in general the proper criterion. That is the same thing as the yearly worth or annual value.

The next case was, I think, *Smith* v. *Birmingham Corpn.* (2), which turns upon the construction of an expression which is, I think, exactly equivalent to the one it is agreed must be read into the Housing Act, 1936. The headnote reads as follows :

> It was provided by a Water Act that the charge to be made for the supply of water for domestic use should be at a rate varying according to the "annual rent" of the premises supplied. The appellant was the owner of certain houses supplied with water by the respondents under the Act. The houses were let at weekly rents, the appellant paying all rates charged thereon, and also for all repairs and insurances in respect thereof. . . . The respondents charged the appellant with water-rates calculated on the following basis : they multiplied the weekly rents by 52 and deducted from the amount so arrived at the actual sums paid by the appellant for rates, and then charged the water-rates upon the balance : Held, that, in order to arrive at the "annual rent" upon which the water-rate was to be computed, an allowance should be made in respect of "voids," i.e., houses lying vacant from time to time ; and that the actual amount of the poor-rates and other rates paid by the appellant was rightly deducted. . . .

The headnote then went on to state that certain other deductions which the landlord claimed were not admissible. It is clear authority that the definition was trying to arrive at the real meaning of the expression "annual rent" when one wants to apply that to weekly tenancies. The amount paid by the landlord for rates and taxes must be deducted, and also there must be deducted a proper sum on account of voids—that is, the chance of houses let on weekly terms being empty from time to time.

Then the same view was taken in *Wilkinson* v. *Bury Water Board* (3), and the very point was considered by Lewis, J., in *Jones & Jones* v. *Nelson* (4). The actual decision in that case turned upon the point that no notice of the want of repair had been given to the landlord, and, therefore, that he was not liable to the claim that was being made against him. The point I have to determine, however, was apparently fully argued, and the judge expressed a very clear view as to what the expression "rent" meant, and, although it is not an actual decision—he says it is not himself—it is a very valuable guide to me to the conclusion at which I ought to arrive. He says, at p. 173 :

> The question which is put to me, and which I have to decide, is whether or not in this section of the Act "rent" means 12*s.* 6*d.* or 12*s.* 6*d.* less the rates.
>
> There is authority for saying that "rent payable" means what it says—namely, the amount which is given to the landlord—but that is not what the section says. The section says "rent," and I am inclined to the view that Mr. Gorman's point as to this is right, and that the word "rent" as used in this section is equivalent to annual value, or the amount which actually comes into the landlord's pocket. I incline to this view upon a consideration of the decision of the court in *Sheffield Waterworks Co.* v. *Bennett* (1), where it was held that "rent" means the amount which comes into the landlord's pocket, and not the gross rent the tenant has to pay. The considerations in that case apply here, and I should be prepared to hold that, in the circumstances, the house was a house within the Housing Act, 1936, s. 2. I say that that is my opinion. I have not considered it very carefully, because it seems to me quite unnecessary for me to do so as no notice that the house was getting out of repair was ever given, and therefore the landlord escapes the liability for any breach of warranty there may be.

Apparently, Lewis, J., had not the advantage of having had *Smith* v.

Birmingham Corpn. (2) reported to him, but obviously, although the name is not mentioned, he had been referred to the last case which I will mention, *Mackworth* v. *Hellard* (5). There the question was what "rent payable" meant in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7), which provides as follows:

> Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy. . . .

It was there held by the Court of Appeal that "rent payable" meant the rent which the tenant had to pay, and not the net amount which the landlord got after paying the rates and taxes. That decision seems to me to be no help in the case I have to decide. I respectfully agree with what LEWIS, J., said about it. If one reads that decision, it seems to me that it really all turns on the word "payable." What was the rent payable? The court felt it could not get away from that, and distinguished the cases to which I have referred on that ground. That word does not come into this at all. It is "at a rent not exceeding £40 per annum or at an annual rent not exceeding £40." The word "payable" is not in the section, and cannot be read into the section. Therefore, I think that that case is clearly distinguishable, and is no help to me in the case which I have to decide. In *Wilkinson* v. *Bury Water Board* (3), the phrase to be interpreted was "annual rack rent or value." The same view was taken there as in *Smith* v. *Birmingham Corpn.* (2). I have come to the conclusion that the only reasonable interpretation is that contended for by the defendant, and that his rooms constitute a house which was within the section.

It is unnecessary to decide the further point as to whether, in seeking to ascertain the true annual rent, one has merely to multiply the weekly rent by 52 or whether one must make a deduction from the sum so arrived at on the ground that a yearly letting avoids the risk of voids, which is inseparable from a letting on weekly terms. *Smith* v. *Birmingham Corpn.* (2) seems to me to be a clear authority for the proposition that some such deduction would have to be made, but I need not deal further with that, as I have come to a clear view on the other point. I direct that judgment should be entered for the defendant on this issue, with costs.

Skelhorn: The defendant in this action is a poor person. I apply on behalf of the solicitor instructing me, that your Lordship should make an order under R.S.C., Ord. 16, r. 31B, either (2) or (3), that the defendant shall recover against the third party—

> . . . profit costs, or a proportion of profit costs, or a sum of money in respect thereof, in addition to out-of-pocket expenses properly incurred in the course of the proceedings, but not fees to counsel or court fees.

In the first place, the defendant is a Greek, who has little or no knowledge of English, and a substantial burden has been put upon the solicitors in this case in getting instructions with regard to the relevant matters. In addition, the solicitors were in the position that, when they accepted instructions in this matter under the poor person's certificate which he was granted, they were dealing with a matter which was simply a defence to a claim against him. Since then, they have had to take these proceedings and join a third party, with the result that there have been substantial interlocutory proceedings, resulting eventually in this issue having to be tried before your Lordship, entirely separately, and in addition to the original issue which the solicitor was concerned to defend on behalf of his client under the poor person's certificate. In those circumstances, I should ask your Lordship to say, either that there were special circumstances within para. (2), or under para. (3) which states:

> Where it appears to the court or a judge that the proceedings are of such length or difficulty as to throw an unusual burden on the solicitor acting for the poor person, the court or judge may order the other party to pay, in addition to out-of-pocket expenses properly incurred in the course of the proceedings, such sum as the court or judge thinks fit in respect of such unusual burden.

Under one or other of those paragraphs I should ask your Lordship to say that this is a proper case in which the solicitor should obtain remuneration in addition to his out-of-pocket expenses.

Kingham: Clearly there should be no costs. Here the third party is fighting against a poor defendant upon a point upon which there was no decision. It is very necessary for him, the only person who can in any possibility be called upon to pay, to see that this matter is properly defended, and to get out of it if he can. Clearly, if in fact the rent was more than £40 per annum, he ought not to have been brought into this matter at all, and therefore a speedy and proper way of getting a decision on that point was the one under which an issue should be tried as to whether the rent exceeded £40 upon the proper construction of the Act of 1936. A less burden is placed upon the defendant's solicitor, because now at the trial he will not have to try this issue which would have been raised at the trial itself.

ATKINSON, J.: I think what is underlying the rule is this. A solicitor acting for a poor person, if an unusually big burden is put upon him, ought not to be working for nothing to the advantage of the man who has lost, and who would otherwise have to pay full costs. If this man was not a poor person, without question the third party would be paying full costs. The only point on which the application can rest is that the proceedings have been unusually complicated and it has not been just one trial and one fight, but a sort of excrescence has been added on to the normal proceedings, throwing a good deal of extra trouble on the solicitor, more than was expected. What I am disposed to do is to order £5 5*s*. as profits costs in addition to the out-of-pocket expenses.

Solicitors: *Leonard Kasler* (for the defendant); *Walfords* (for the third party).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law*.]

[illegible] LONDON UNIV

Printed by Thomas De La Rue & Co., Ltd., 110 Bunhill Row, London, E.C.1: and
published by Coke Press, Ltd., 37, Essex Street, Strand, London, W.C.2.—*Saturday,*
December 23, 1939. Price 2s. 6d.